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No. _____

In the
Supreme Court of the United States

HOME BUILDERS ASSOCIATION
OF NORTHERN CALIFORNIA,

Petitioner,

v.

CITY OF NAPA,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals, State of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a city may condition a permit to build homes on one's property on the landowner's subsidy of "low-income" housing (either by selling or renting a specified percentage of the homes at below-market rates or by paying an in-lieu fee), where the city has failed to establish any nexus between the construction of market-rate housing and an increased shortage of low-income housing.

2. Must a property owner request a waiver from a regulation that is unconstitutional in every application before he can present a claim that is ripe for judicial review?

3. Is the Due Process Clause of the Fifth Amendment to the United States Constitution violated when apartment owners are required to rent certain units in perpetuity at rates tied to the median income of a city's residents without any consideration of actual costs?

LIST OF ALL PARTIES

Petitioner: Home Builders Association of Northern California.

Respondents: City of Napa, California.

Intervenors and Respondents: Napa Valley Community Housing, a California nonprofit corporation; Non-Profit Housing Association of Northern California, an unincorporated association; Housing California, a California nonprofit corporation; Patricia Domingo; Heather Clayton; Donna Simon; Hilda Avina; Rainy Stegall; and Hector Candelario.

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PETITION FOR WRIT OF CERTIORARI

Home Builders Association of Northern California (Home Builders) respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal.

OPINIONS BELOW

The final opinion of the California Court of Appeal, as modified by the court, is reported in part at 90 Cal. App. 4th 188 (2001), and is reproduced as Appendix A to this petition. The original opinion, now withdrawn, was reported at 89 Cal. App. 4th 897 (2001), and is not reproduced in the appendix. The unreported order of modification to the original opinion is reproduced as Appendix D. The Court of Appeal's unreported denial of a petition for rehearing is reproduced as Appendix C. The California Supreme Court's unreported denial of review is reproduced as Appendix B. Finally, the Judgment of the Superior Court is unreported and is reproduced as Appendix E.

JURISDICTION

The original opinion of the California Court of Appeal was filed on June 6, 2001. This opinion was amended on July 2, 2001. The order of the California Supreme Court denying Home Builders' Petition for Review was filed September 12, 2001. This petition is timely under Supreme Court Rule 13. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution states in relevant part, "nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution states in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

The City of Napa's Ordinance O1999/19, entitled, "An Urgency Ordinance of the City of Napa, County of Napa, State of California, Adding Chapter 15.94 to the Napa Municipal Code Creating and Establishing a Housing Trust Fund, A Housing Impact Fee on Non-Residential Development and Establishing an Inclusionary In-Lieu Fee Requirement for Residential Development Projects," is set out in Appendix F to this petition.

The City of Napa's Ordinance O1999/20, entitled, "An Ordinance of the City of Napa, County of Napa, State of California, Adding Chapter 15.94 to the Napa Municipal Code Creating and Establishing a Housing Trust Fund, A Housing Impact Fee on Non-Residential Development and Establishing an Inclusionary In-Lieu Fee Requirement for Residential Development Projects," is the permanent version of City of Napa Ordinance O1999/19. It is reproduced in Appendix G.

The City of Napa's Resolution R1999/161, entitled, "Resolution of the City Council of the City of Napa, State of California, Setting the Housing Impact Fee and Housing In-Lieu Fee for Developments Within the City of Napa," is reproduced as Appendix H to this petition.

Chapter 17.84 of the City of Napa Municipal Code, entitled, "Affordable Housing" is reproduced as Appendix I.

STATEMENT OF THE CASE

A. Factual Background–The Disputed Ordinances and Resolution

After years of growth-retarding zoning laws characterized by expansive set-asides for open space and agriculture, urban-limit lines, and large lot subdivisions, the City of Napa (City) concluded that there was not enough housing for lower income residents. In 1999, the City adopted a so-called "inclusionary zoning"[1] law that places the burden of constructing and paying for low-income housing on the developers (and thus ultimately on the purchasers or renters) of new homes.[2] As shown below, under the City's ordinance, for every nine new homes or apartments that a property owner obtains approval to build, he or she must construct an additional unit of like quality and appearance and sell or rent that unit at a below-market rate price to a lower income household. Municipal Code §§ 15.94.050(A) & (I), App. at G-29 to G-30, G-36 to G-37. If the unit is not sold by the time a certificate of occupancy is issued, it must be sold to the City at the artificially low price. Municipal Code § 15.94.050(F)(1)(d), App. at G-34. In some cases, a property owner may arrange to provide an alternative exaction or pay an in-lieu fee. Municipal Code §§ 15.94.050(B)-(E), App. at G-30 to G-32, and Resolution R1999/161, App. H. Violation of the

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[1] The term "inclusionary zoning" refers here not to zoning laws that reserve land for higher density or lower income housing, or that undo exclusionary laws, but to laws that force developers of market rate housing to subsidize housing for lower income renters and buyers.

[2] The law consists of City of Napa Ordinances O1999/19 and O1999/20, which add City of Napa Municipal Code § 15.94, and City of Napa Resolution O1999/161. Because the code in O1999/19 is only temporary and nearly identical to the new code found in the permanent Ordinance O1999/20, appendix references in this petition to Municipal Code § 15.94 will be made only to the final version found in Ordinance O1999/20, as reproduced in Appendix G.

ordinance is a "public nuisance" and criminal misdemeanor offense. Municipal Code § 15.94.060, App. at G-39. In effect, the inclusionary zoning ordinance conscripts residential developers and, under threat of criminal sanction, requires them to dedicate land, material, time, or capital to construct and sell low-income housing.

The inclusionary zoning law allows property owners to choose their poison from among three alternatives. Municipal Code §§ 15.94.050(A) to (C), App. at G-29 to G-32. Alternative number one requires property owners building residential housing to provide a substantial in-kind subsidy to low-income individuals, requiring that homes be rented or sold at subsidized prices and only to persons falling within specified income categories. Municipal Code § 15.94.050(A), App. at G-29 to G-30. With respect to rental units, the challenged ordinances require property owners who develop rental housing to rent 10% of their units at rates that are based entirely upon certain fixed percentages of the income levels of lower and very low-income households and are unrelated to any measure of actual costs. Municipal Code §§ 15.94.020(B)-(C) and § 15.94.050(G), App. at G-11 to G-12, G-35. Specifically, one-half of the subsidized units, or 5% of the total, must be rented to low-income residents at a rate that is no more than 30% of 80% of the median income in Napa. *Id.* The remaining 5% must be rented to very low-income individuals at a rate no greater than 30% of 50% of the median income. *Id.* There is no mechanism available to adjust these rents upward, ever, in the event that the owner must make significant capital improvements or if unanticipated expenses are incurred. In other words, there is no mechanism to ensure that rents can be adjusted to ensure a fair rate of return. These affordability provisions must be guaranteed in "perpetuity." Municipal Code § 15.94.050(J), App. at G-37 to G-38.

For units that are sold rather than rented, Section 15.94.020(C) of the Napa Municipal Code defines in part

"Affordable sales price" to be "affordable only if each monthly owner-occupied housing payment is equal to or less than one-twelfth of 30% of income for the specified target income household." App. at G-11. Low-income buyers have an income that does not exceed 100% of the median income. Municipal Code § 15.94.050(H), App. at G-35. Ten percent of all homes must be sold at these artificially low prices.

Alternative number two is explained by Municipal Code § 15.94.050(B) and it allows an "Alternative Equivalent Proposal" wherein a property owner may propose such actions as the "dedication of vacant land, the construction of affordable units on another site or acquisition and enforcement of required rental/sales price restrictions on existing standard dwelling units." App. at G-30. The City Council has the complete discretion to approve or disapprove the proposed alternative. Municipal Code § 15.94.050(B), App. at G-30.

The third alternative allows the property owner to pay an "in-lieu housing fee." Under this proposal, the property owner would pay the fee set out in City of Napa Resolution No. R1999/161. App. at H-3 to H-4. A developer of residential housing for sale may choose to pay the fee, while developers of multifamily units must obtain permission of the City Council. Municipal Code § 15.94.050(C), App. at G-30 to G-32. For units with construction costs between $86,700 and $115,250, the fee is 1%. For units over $115,250, the fee is 2%. Resolution R1999/161(2)(B)-(2)(C), App. at H-4. For example, a project of 100 homes of 2500 square feet and an average Uniform Building Code valuation of $226,500 would result in a fee of $4,530 per market rate unit.

There are no "density bonuses" or other economic incentives available for landowners who meet the basic requirements set out above. For landowners who *exceed* these requirements, incentives are available. *Compare* Ordinance No.

O1999/20, Municipal Code § 15.94.050(F)(2), App. at G-34, *with* Municipal Code ch. 17.84, App. I.

Because the subsidized units for sale or rent must "be comparable in number of bedrooms, exterior appearance and overall quality of construction to market rate units in the same residential project," the owner has very limited flexibility in developing less expensive units to sell or rent at the mandated below-market price to lower- and very low-income persons. Municipal Code § 15.94.050(I), App. at G-36.

Prior to adopting the inclusionary zoning law, the City neither developed nor cited *any* evidence demonstrating that the construction of new residential housing causes or in any way contributes to the City's need for low-income housing. The City did not prepare any studies that demonstrate that families moving into new homes and apartments displace land or housing that would otherwise be occupied by lower income persons. In fact, as alleged in Home Builders' complaint, in every single application to develop residential development approved prior to the adoption of the challenged law, the City expressly found that there would be no adverse impact on affordable housing needs.[3] Nor did the City prepare any evidence that forcing builders to subsidize low-income housing would alleviate the alleged housing shortage. However, seeking to finance a worthy social program without inconveniencing the taxpayers of Napa, the City found the developers of new housing to be too tempting of a target to ignore and therefore singled them out to bear the burden.

B. The Proceedings Below

On September 17, 1999, shortly after the inclusionary zoning law was adopted, Home Builders filed suit. Home Builders alleged, among other things, that the law violated the Takings and Due Process Clauses of the United States

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[3] Complaint ¶ 22, found in the Joint Appendix below at 8.

Constitution. The City demurred to the complaint and intervenors joined the demurrer. The trial court sustained, without leave to amend, *see* App. E, and Home Builders appealed. The court of appeal affirmed. *See* App. A.

1. The Takings Clause Challenge

In its takings claim, Home Builders contended (1) that permit conditions that impose exactions of land or money upon residential development must be reviewed under the "heightened scrutiny" and "essential nexus" standards of *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 n.3, 836-37 (1987), and (2) that *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994), requires a City to demonstrate that the exaction is "roughly proportional" to the development's impacts. The court rejected Home Builders' Takings Claim on three independent grounds.

First, in considering whether the "ordinance is invalid under *Nollan* and *Dolan* because there is no 'essential nexus' or 'rough proportionality' between the exaction required by the ordinance, and the impacts caused by development of property," the court found that "*Nollan* and *Dolan* are inapplicable" because in the court's view the ordinance imposes exactions that are "generally applicable through legislative action" because it applies to all home builders. Therefore the "essential nexus" standard of *Nollan* and the "rough proportionality" standard of *Dolan* do not apply. App. at A-9.

Furthermore, the court found, that because the zoning law is a "generally applicable legislative enactment rather than an individualized assessment imposed as a condition of development, the burden shifting standard described in *Dolan* does not apply." App. at A-7. In other words, the City has no burden to demonstrate that there is a nexus or rough proportionality between building homes and a need to subsidize low-income housing.

Second, while not addressing whether there was any nexus between the development of new homes and a need for subsidized low-income housing, the court below assumed that "it is beyond question that City's inclusionary zoning ordinance will 'substantially advance' the important governmental interest of providing affordable housing" because it "will necessarily increase the supply of affordable housing." App. at A-8. The court did not consider the legitimacy of advancing a state interest through the imposition of a disproportionate cost on a small segment of society.

Third and finally, the court of appeal also concluded that because the "City has the ability to waive the requirements imposed by the ordinance, the ordinance cannot and does not, on its face, result in a taking." App. at A-6. In other words, because the City has the option of waiving an ordinance which is alleged to be always unconstitutional, there is no ripe constitutional violation.

2. The Due Process Clause Challenge

Home Builders also brought a due process challenge to the requirement that they or the future owners of rental housing constructed under this ordinance provide subsidized rental housing for eternity without any hope of ever receiving a cost-based adjustment. The court rejected this allegation on several grounds. First, it found that developers of multifamily housing did not have a right to a "fair return," explaining that "we are not aware of, any case that holds a housing developer is entitled to 'fair return' on his or her investment." App. at A-13. That, however, did not answer the question of whether government may impose a permanent confiscatory rate regulation without any opportunity for adjustment. Second, the court concluded that because a developer could ask the city for permission to pay the city not to impose the rental requirement (through an in-lieu fee or some other undefined alternative), that there was actually no requirement that units be rented at below-market

rates. App. at A-13 (ordinance does not require subsidized rentals because the developer "may choose one of the alternatives, such as donating vacant land or paying an in-lieu fee"). Finally, it held that the City can waive a developer's obligations to set aside units for low-income rentals at the outset, if the developer can prove to the City Council a lack of a "reasonable relationship or nexus" between the development and the exaction a facial due process challenge must fail. App. at A-13 to A-14 (the "city officials [can] reduce, modify or waive the requirements"). The court did not address whether there has been a violation of the due process rights of those developers and their successors who do not qualify for the waiver at the outset and who must rent, in perpetuity, units to low-income households with no hope of ever adjusting the rents above the median income formula found in the ordinance.

On September 12, 2001, the California Supreme Court denied review. *See* App. B.

REASONS FOR GRANTING THE WRIT

On two important questions of takings law and procedure, and on a significant issue of federal due process law, the court below issued a decision that is in conflict with the decisions of this Court, as well as the lower courts, both state and federal. All of these conflicts warrant resolution by this Court.

I

ONLY THIS COURT CAN RESOLVE THE SERIOUS CONFLICTS IN THE STATE AND LOWER FEDERAL COURTS OVER WHETHER LEGISLATIVELY ADOPTED EXACTIONS IMPOSED ON THE DEVELOPMENT OF LAND ARE IMMUNE FROM SEARCHING REVIEW

It should be plain that government cannot condition the exercise of the right to put property to economically beneficial

use upon the forced payment of land, money, or labor when those exactions are not closely related to impacts caused by the use of the underlying property.[4] Thus in *Nollan* this Court held that when government could legitimately exercise its police power and deny a permit, it may instead impose a condition on the approval–but only if that condition has a nexus to and serves to ameliorate the public harm that could have justified the permit denial. 483 U.S. at 835-37. In *Dolan* this Court refined this analysis by explaining, first, that there must be some "rough proportionality" between an exaction and the adverse impact caused by the use of the underlying property and, second, that the government imposing the exaction had the burden to justify that exaction. 512 U.S. at 391 & n.8, respectively. The requirement that such exactions be subject to this "heightened scrutiny" is perfectly sensible and insulates landowners from overreaching governmental entities that might otherwise take unfair advantage of persons during the

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[4] Labor, is of course, a form of property fully protected by the Constitution. As James Madison stated:

> [Man] has an equal *property in the free use of his faculties* and free choice of the objects on which to employ them. . . .
>
> . . . .
>
> If there be a government then which prides itself in maintaining the inviolability of property; which provides that none shall be taken directly even for public use without indemnification to the owner, and yet directly violates the property which individuals have in their opinions, their religion, their persons, and their faculties; nay more, which indirectly violates their property, in their actual possessions, *in the labor that acquires their daily subsistence*, and in the hallowed remnant of time which ought to relieve their fatigues and soothe their cares, the influence will have been anticipated, that such a government is not a pattern for the United States.

James Madison, *A Property in Our Rights*, National Gazette, Mar. 27, 1792 (emphasis added).

application process. Unfortunately, it is a requirement that some states, including California, are resisting with great vigor. Even after this Court's examination of regulatory exactions in *Nollan* and *Dolan*, the state and lower federal courts remain in serious disarray in determining how (or even whether) to measure these sort of conditions against the Takings Clause.

A. All Ordinances That Exact Land, Money, or Labor as a Prerequisite to the Exercise of the Right to Use Property Must Be Subject to Heightened Scrutiny

1. A Holding That Immunizes Legislative Acts from Heightened Scrutiny Is in Conflict with the Precedents of This Court

The court below suggests that the Napa land use exactions can evade the searching judicial inquiry required by *Nollan* and *Dolan* because there is a *legislative* enactment that applies to a class of property owners such as developers. App. at A-9 to A-10 (excluding searching review of ordinance because it is "generally applicable through legislative action"). However, it is clear that this holding conflicts with the facts and intent of *Nollan*, *Dolan*, and *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

While this Court noted in *Dolan*, 512 U.S. at 385, that a standard of deference is applied to "essentially legislative determinations classifying entire areas of the city" it was specifically referring to the sort of zoning regime described in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), where land ***use*** regulations are applied on a generally applicable geographical or similar basis. This Court was not exempting from heightened review a requirement, targeted ***only*** at those landowners engaged in residential home building, that a landowner perform a task or pay a fee as a prerequisite to using his or her land. Indeed, the ordinance here is no more "generally applicable through legislative action" then were the

challenged laws in *Nollan* and *Dolan*. In *Nollan*, this Court noted the Coastal Commission's "public announcement" (and thus uniform application) of its exaction policy, 483 U.S. at 833 n.2, in response to Justice Brennan's dissent that found it significant that "[t]he Coastal Commission Interpretative Guidelines make clear that fulfillment of the Commission's constitutional and statutory duty requires that approval of new coastline development be conditioned upon provisions ensuring lateral public access to the ocean," *Nollan*, 483 U.S. at 857-58 (Brennan, J., dissenting). In other words, just as in the present case, the disputed exaction requirement was broadly applicable through legislative enactment.

Likewise, the statutory requirement in *Dolan* that landowners contribute to transportation infrastructure was also generally applicable and adopted through legislative action. *Dolan*, 512 U.S. at 378 (noting that the Community Development Code "requires that new development facilitate this plan by dedicating land for pedestrian pathways"). In short, the lower court's crafting in *Napa* of a distinction for generally applicable legislatively adopted conditions is in marked conflict to the history and examples in *Nollan* and *Dolan*.[5]

2. Legal Scholars Suggest That Legislative Enactments Requiring Exactions Deserve Heightened Scrutiny; Others Have Observed Widespread Conflict in the State and Federal Courts

Legal scholars have opined that legislative enactments restricting property rights deserve heightened scrutiny. For example, Professor Kmiec suggests that heightened scrutiny is appropriate for legislative enactments imposing public burdens

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[5] Two members of this Court have also expressly questioned the wisdom of treating legislative enactments to special deference in *Parking Association of Georgia v. City of Atlanta*, 515 U.S. 1116 (1995) (Thomas, J., dissenting from denial of certiorari).

on specific private uses. Douglas W. Kmiec, *The "Substantial Advance" Quandary: How Closely Should Courts Examine the Regulatory Means and Ends of Legislative Applications?*, 22 Zoning & Plan. L. Rep. 97, 102-04 (1999). Other scholars have noted the conflicts that exist among the lower federal and state courts, with some courts treating exactions very differently according to whether they are legislatively adopted or not, and whether they are fees or some other form of exaction. *See, e.g.*, James E. Holloway & Donald C. Guy, *A Limitation on Development Impact Exactions to Limit Social Policy-Making: Interpreting the Takings Clause to Limit Land Use Policy-Making for Social Welfare Goals of Urban Communities*, 9 Dick. J. Envtl. L. & Pol'y 1, 8 n.12 (2000); Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of Nollan v. California Coastal Commission*, 23 Harv. J.L. & Pub. Pol'y 233, 283 (1999) ("Even in the states, where a unified interpretation [of *Nollan*] might be expected to center around a leading state supreme court case, there are often multiple contradictory decisions; at the level of federal circuits, this inconsistency becomes chronic.").

3. Many State Courts and a Lower Federal Court Require Heightened Scrutiny for Legislatively Enacted Exaction Requirements

The holdings of several states and the First Circuit confirm that generally applicable legislative enactments are subject to the standards established in *Nollan* and *Dolan*.

New York: Before *Dolan* was decided, but after *Nollan*, the New York Court of Appeals struck down a permit fee imposed on owners of single room occupancy hotels who wished to change the use of their property in *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (N.Y. 1989). The fee was designed to subsidize the City's low-income housing program and had been imposed by legislation and, as such, was uniformly applied. 542 N.E.2d at 1061-62. The court focused

on the lack of a nexus between the complex problem of low-income housing in New York City and the landowners' use of their property for other purposes, *id.* at 1069, stating that "[s]uch a tenuous connection between means and ends cannot justify singling out this group of property owners to bear the costs required by the law toward the cure of the homeless problem." The same court also struck down legislatively enacted rent control ordinances as being violative of the Takings Clause in *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 487 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995). That decision relied upon *Nollan* and *Dolan*. These holdings are in marked contrast to the decision below which refused to analyze with any degree of serious scrutiny a legislatively enacted land use permit exaction requirement.

Ohio: In *Home Builders Association of Dayton v. City of Beavercreek*, 729 N.E.2d 349, 356 (Ohio 2000), the Supreme Court of Ohio, citing to *Dolan*, applied a "middle level of scrutiny" to legislatively adopted transportation impact fees imposed on subdivision approvals. The court reasoned that a test that looks at both the need for the transportation project and the fairness of imposing the cost on developers is a test that will

> adequately balance the interests of local governments with those of property owners. The first prong of the test decides whether the ordinance is an appropriate method to address the city's stated interests, and the second prong assures that the city and developers are paying their proportionate share of the cost of new construction.

Id. The court upheld the fees in that case after noting that the trial court "reviewed volumes of evidence" and made the requisite factual findings regarding the necessity for the road projects and the impacts to be caused by subdivision development. *Id.* at 358. No such analysis, however, was performed by the City of Napa or any court below. In fact,

there is no evidence in the record showing any relationship between the building of market-rate homes and an increased need for low-income housing.

Oregon: Citing to state Supreme Court precedent, the Oregon Court of Appeals has held in *J.C. Reeves Corp. v. Clackamas County*, 887 P.2d 360, 365 (Or. Ct. App. 1994), that " 'the character of the [condition] remains the type that is subject to the analysis in Dolan' whether it is legislatively required or a case-specific formulation. The nature, not the source, of the imposition is what matters." (Citation omitted.) (Quoting *Schultz v. City of Grants Pass*, 884 P.2d 569, 573 (Or. 1994).) The decision below, in contrast, focused not on the conditions imposed but upon the manner of enactment.

Washington: In *Sparks v. Douglas County*, 904 P.2d 738, 746 (Wash. 1995), the Washington Supreme Court applied *Dolan* to a legislatively adopted road dedication exaction. It upheld the exaction because there was evidence showing that the exaction was roughly proportional to the impacts of development. In *Trimen Development Co. v. King County*, 877 P.2d 187 (Wash. 1994), a developer had been given the choice of dedicating or reserving land for open space or paying a fee in lieu of such dedication. The court properly recognized the applicability of the *Dolan* test to these legislatively imposed fees. 877 P.2d at 194. The fees were upheld, incidentally, as the court found evidence to support the conclusion that the fees were "reasonably necessary as a direct result of Trimen's proposed development." *Id.* In the California decision below, of course, there was no examination of evidence, or even any opportunity to introduce evidence that would have demonstrated that the construction of market rate housing in no way contributes to a shortage of low-income housing.

Illinois: The Illinois Supreme Court in *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 384, 390 (Ill. 1995), applied *Dolan* to a legislatively

enacted transportation district and impact fee enabling act. (The Court then proceeded to apply its even more exacting "specifically and uniquely attributable" rule in striking down part of the statute.) Similarly, an Illinois appellate court agreed in *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380 (Ill. App. Ct. 1995), *cert. denied*, 519 U.S. 976 (1996), that

> [a]lthough not binding as precedent, we find Justice Thomas' comments [in *Parking Association of Georgia*] particularly persuasive and consonant with the rationale underlying *Dolan* and similar cases. Certainly, a municipality should not be able to insulate itself from a takings challenge merely by utilizing a different bureaucratic vehicle when expropriating its citizen's property.

Id. at 390. Such "insulation" is precisely what has occurred in the City of Napa.

First Circuit: The First Circuit has also articulated the law in a way contrary to the court below. In *City of Portsmouth v. Schlesinger*, 57 F.3d 12 (1st Cir. 1995), the court reviewed a low-income housing fee that had been imposed when the owner of the site of some low-income apartments sought permission to replace the apartments with new condominiums. *Id.* at 13. While the challenge to the fee was saddled with a statute of limitations problem, the court noted that the facts were undisputed that "no rational nexus existed between the amount of the Developers' . . . [fee] and any burden imposed on the City due to the zoning change." *Id.* at 14. If not for a statute of limitations problem, the court would have struck down the fee. Again, the contrast between this case and the Napa decision below is remarkable. The First Circuit and all the courts listed above were willing to examine carefully the stated justifications

for land use regulations that were legislatively enacted.[6] The court of appeal below was not.

4. However, There Are Also Several States That Are in Marked Conflict with the Analysis of the Majority of States

While many state and lower federal courts understand that the proper role of the judiciary is to review carefully attempts to exact real property or labor, with the initial burden of proof to be carried by government, there are a significant number of state courts that do not understand this.

New Jersey: The New Jersey Supreme Court has been particularly aggressive, not only in upholding inclusionary-zoning ordinances, but in actually mandating them. In *Holmdel Builders Association v. Township of Holmdel*, 583 A.2d 277 (N.J. 1990), the New Jersey Supreme Court considered whether various municipal inclusionary zoning ordinances that required the payment of low-income housing fees were constitutional. With respect to a challenge under the Takings Clause, the court merely observed that "[a]s long as the measures promulgated are not confiscatory and do not result in an inadequate return of investment, there would be no constitutional injury." *Id.* at 293. The court noted that it had earlier held in *Southern Burlington County NAACP v. Township of Mt. Laurel*, 456 A.2d 390 (N.J. 1983) (*Mt. Laurel II*), that "municipalities [must] use affirmative inclusionary-zoning measures, including mandatory set-asides, to redress affordable-housing needs." *Holmdel Builders*, 583 A.2d at 294 (citing *Mt. Laurel II*, 456 A.2d at 436). Interestingly, the court in *Mt. Laurel II* barely addressed a Takings Clause argument, dismissing with a single sentence that "mandatory set-asides keyed to the construction of lower

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[6] Similarly, the Virginia Supreme Court found a legislatively enacted inclusionary zoning law to violate the Virginia constitution's Takings Clause in *Board of Supervisors of Fairfax County v. DeGroof Enterprises*, 198 S.E.2d 600, 602 (Va. 1971).

income housing, are constitutional and within the zoning power of a municipality." 456 A.2d at 448. In *Holmdel Builders* the court ultimately concluded that "a residential developer could be required to set aside a percentage of units to be used for low- and moderate-income housing." 583 A.2d at 294. Since development fees perform an "identical function" they are permissible. *Holmdel Builders*, 583 A.2d at 294. The difficulty with the court's analysis is that it completely ignores the "substantially advance" test of *Agins*, the nexus requirement of *Nollan*, and the rough proportionality standard of *Dolan*.[7]

North Dakota: In determining whether a drainage requirement could be applied to property of Burlington-Northern Railroad in light of *Dolan*, the Supreme Court of North Dakota held that it could because the duty "in this case arises not from a municipal 'adjudicative decision to condition,' but rather from an express and general legislated duty under a

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[7] Indeed, a few courts have even found that development fees are not subject to *Nolan*'s nexus test or *Dolan*'s rough proportionality standard. *See, e.g., McCarthy v. City of Leawood*, 894 P.2d 836, 845 (Kan. 1995). This is not only in conflict with the holdings from some of the states described in Part I(A)(3), *supra*, it is even in conflict with California. *See Ehrlich v. City of Culver City*, 911 P.2d 429, 450 (Cal.), *cert. denied*, 519 U.S. 929 (1996) (finding that *Dolan* applies at least to individually applied fees). Furthermore, many of the state cases relied upon by the *Dolan* majority in formulating its "roughly proportional" test involved fees. As noted by Justice Stevens:

> All but one of the cases involve challenges to provisions . . . requiring developers to dedicate either a percentage of the entire parcel . . . or an equivalent value in cash . . . to help finance the construction of . . . parks, and playgrounds. In assessing the legality of the conditions, the courts gave no indication that the transfer of an interest in realty was any more objectionable than a cash payment.

Dolan, 512 U.S. at 400 (Stevens, J., dissenting).

constitutional reservation of police power over a corporation." *Southeast Cass Water Resource District v. Burlington Northern Railroad Company*, 527 N.W.2d 884, 896 (N.D. 1995).

Minnesota: In *Arcadia Development Corp. v. City of Bloomington*, 552 N.W.2d 281 (Minn. Ct. App. 1996), *review denied*, No. CO-96-157, 1996 Minn. LEXIS 795, a Minnesota appellate court upheld the imposition of a tenant-relocation fee imposed on owners of mobile home parks in exchange for permission to go out of the mobile home park business. The appellate court rejected application of *Dolan* to tenant relocation fees because the fee was legislatively imposed. It found that "[o]nce legitimate governmental interests are identified, courts simply require a nexus between the local legislation and the legitimate governmental purposes." 552 N.W.2d at 287. Furthermore, "Because this case involves a challenge to a citywide, legislative land-use regulation, *Dolan*'s 'rough proportionality' test does not apply." *Id.* at 286.

Arizona: In *Home Builders Association of Central Arizona v. City of Scottsdale*, 930 P.2d 993 (Ariz.), *cert. denied*, 521 U.S. 1120 (1997), the Arizona Supreme Court upheld the city's resource development fee that was imposed on land owners in order to build a new water supply infrastructure. The court found that *Dolan* did not affect the legality of the fee at issue and refused to apply heightened scrutiny because the fee was "legislatively" imposed: "Because the Scottsdale case involves a generally applicable *legislative* decision by the city, the court of appeals thought *Dolan* did not apply. We agree, *though the question has not been settled by the Supreme Court*." 930 P.2d at 1000 (emphasis added). It is time that this Court settles this issue in order to resolve the dramatic conflict in the state and lower federal courts.

B. The Court Below Also Erred in Concluding That Merely Because the Ordinance "Will Necessarily Increase the Supply of Affordable Housing" It Is Necessarily Constitutional

Another separate justification provided by the court below for its holding was its conclusory finding, provided without any reference to the (non-existent) evidentiary record, that it is "beyond question that City's inclusionary zoning ordinance will 'substantially advance' the important governmental interest of providing affordable housing" because it "will necessarily increase the supply of affordable housing." App. at A-8. Even if this assumption is correct,[8] it is an answer to the wrong question. The proper inquiry is not whether forcing the builders and buyers of new homes to subsidize low-income housing actually creates low-income housing; it is whether it is proper to impose this duty upon the builders and buyers in the first place. To the extent that the nexus requirement of *Nollan* or the rough proportionality standard of *Dolan*, or even the more fundamental "substantially advance" test of *Agins* applies, it is incumbent upon the courts to determine not only whether the exaction happens to serve some public purpose, but also whether it is appropriate to impose the cost of furthering that public purpose upon landowners who happen to require permits to utilize their property. This is the question properly answered by those authorities discussed above in Part I(A)(3), *supra*. For example, there was no question that the New York City

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[8] There is some evidence that inclusionary zoning development fees do little to actually produce low-income housing. *See, e.g.*, Laura M. Padilla, *Reflections on Inclusionary Housing and a Renewed Look at Its Viability*, 23 Hofstra L. Rev. 539, 553 n.72 (1995) ("[S]ome of these programs have collected a substantial amount of fees and have yet to produce a single housing unit."). It is also arguable that the disincentive to building any new housing created by this ordinance may exacerbate, rather than alleviate, any shortage of affordable housing that may exist.

ordinance in *Seawall* might contribute to low-income housing, no question that the law in *Sparks* would finance roads in the State of Washington, and no question that transportation infrastructure would result from the law in *Northern Illinois Homebuilders Association*. Yet, the laws were subjected to heightened scrutiny review in every one of these cases and struck down in some of these cases because they violated the Takings Clause. These cases are in marked conflict with the rationale of the opinion below.

II

A FACIAL REGULATORY TAKINGS CLAIM IS NOT MADE UNRIPE MERELY BECAUSE A LITIGANT CAN APPLY FOR A WAIVER BASED UPON AN ORDINANCE'S AS APPLIED UNCONSTITUTIONALITY

Under the City's inclusionary zoning ordinance, if a property owner can prove to the *city council's* satisfaction that application of the ordinance will not meet the constitutionally mandated requirement of a "reasonable relationship or nexus between the impact of the development and either the amount of the fee charged or the inclusionary requirement," then the City has the discretion to waive or modify the application of the ordinance. Ordinance No. O1999/20, Municipal Code § 15.94.080, App. at G-40. In other words, if a property owner can convince the City that its ordinance is unconstitutional, the City may choose not to apply the ordinance to that property owner.

The court below found that "[s]ince City has the ability to waive the requirements imposed by the ordinance, the ordinance cannot and does not, on its face, result in a taking." App. at A-6. The meaning behind this holding is simply that so long as this waiver mechanism is in place, no facial regulatory taking claim can ever be ripe. Thus, the Takings Clause challenge will be unripe even when Petitioner argues, as it does

here, that the ordinance will always be unconstitutional in every conceivable application. But may a state's legal landscape be littered with unconstitutional local and state laws merely because they contain "waiver" provisions?

Suppose a city adopts an ordinance making it unlawful for any person not a resident of the city to bid on public works contracts. Suppose further that the ordinance contains the following waiver provision:

> Any nonresident seeking to bid on a city contract may appeal to the city council for a waiver of the residency requirement based upon a showing that the requirement is not narrowly tailored to advance a compelling governmental interest and violates the Equal Protection Clause.

Or suppose that a county passes an ordinance making it unlawful for persons of a certain race to bid on public works contracts—unless a potential bidder proves in a hearing that the racial classification did not satisfy strict scrutiny? Or, suppose a rent control ordinance required the hearing officer to consider the race of a tenant, but that he could waive that consideration if he thought it were unlawful? *See Pennell v. City of San Jose*, 485 U.S. 1, 16 (1988) (Scalia, J., dissenting in part).

Each of these hypothetical waiver provisions is identical in operation to the waiver provision at issue in this case. Each provides for a waiver of the ordinance's substantive requirement if the regulated person demonstrates that the requirement violates the relevant test for determining its constitutionality. In no instance, however, should the existence of the waiver provision immunize the ordinance from facial challenge. To prevail against a facial challenge, the government must be able to demonstrate that an ordinance can be applied constitutionally. Contrary to the court of appeal's characterization, an ordinance is not applied constitutionally when it is waived.

Home Builders alleges that there are *no* circumstances where the ordinance can be lawfully applied because the construction of residential housing in no way exacerbates any shortage in low-income housing.[9] Home Builders have further alleged that its members own real property within the City of Napa that is being adversely impacted by the ordinance.[10] Nevertheless, landowners must, in each and every case, petition the City for an opportunity to prove that the unconstitutional ordinance will be applied unconstitutionally.[11] For the purposes of a demurrer, an allegation that an ordinance will always be unconstitutional because there are no facts that can support its application cannot be saved by a waiver provision, any more than a waiver provision can save an ordinance that infringes upon the right to speech, equal protection, or any other freedom protected by the Constitution.

The notion that landowners must first apply for a waiver to the ordinance before they may bring a facial challenge is contrary to the ripeness doctrines as enunciated by this Court and several lower federal courts.

In *Village of Euclid*, for example, this Court wrote:

> [T]he attack is directed, not against any specific provision or provisions, but against the ordinance as an entirety. Assuming the premises, the existence

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[9] *See, e.g.*, Complaint ¶¶ 22, 24-31, found in the Joint Appendix of the record below at 8-10.

[10] *See, e.g.*, Complaint ¶ 2, found in the Joint Appendix below at 2.

[11] A further problem with the scheme here is that *Dolan* expressly laid the burden of proof on the City to prove that an exaction placed upon the development of property meets the "roughly proportional" standard. 512 U.S. at 391 n.8. A requirement that a landowner must prove the lack of a "reasonable relationship" not only applies the wrong standard but it turns the burden of proof on its head.

> and maintenance of the ordinance, in effect, constitutes a present invasion of appellee's property rights and a threat to continue it. Under these circumstances . . . jurisdiction is clear.

272 U.S. at 386.

This reasoning was followed in *Beacon Hill Farm Associates II Limited Partnership v. Loudoun County Board of Supervisors*, 875 F.2d 1081 (4th Cir. 1989), where the Fourth Circuit discussed the ripeness holding of *Village of Euclid v. Ambler Realty*, noting:

> The court distinguished between an attack based on a specific injury in the process of actual application of the ordinance and an attack based on "the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing the opportunities of the market, constitute a present and irreparable injury." . . . [272] U.S. at 395. The latter, the facial attack, is quite permissible regardless of whether the landowner has applied for or received a final determination of the extent to which the ordinance would affect his land use.

875 F.2d at 1083. In fact, as noted by the court in *Beacon Hill*, this Court has frequently entertained ***facial*** challenges to land use regulations, without requiring the litigant to apply for a permit or waiver. *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295 (1981). Thus the *Beacon Hill* court concluded:

> In view of the fact that a facial challenge to a land use ordinance must carry such a heavy burden of persuasion that it may even seem that the claim of facial invalidity is entirely without merit, the

> question should nevertheless be decided for the claim is not premature merely because it is brought before a final determination of the extent of the ordinance's application to a specific piece of property after application for the proper permits has been made.

875 F.2d at 1085 (footnote omitted). This holding is clearly in conflict with the decision below that refused to entertain a facial challenge to a land use regulation which petitioners assert is unconstitutional in every conceivable application.

This Court has entertained facial attacks based on the alleged unconstitutionality of a statute in more contexts than just violations of the Takings or Due Process Clauses. For example, in *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 132 (1992), this Court allowed a First Amendment challenge to a parade permit fee requirement to proceed, despite the availability of such permits, because of the unfettered discretion possessed by county officials to set the amount of the fee. A similar holding had been reached earlier in *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 497-98 (1982). In this case, the City Council's determination of whether a waiver is available is based upon its determination of whether there is a "reasonable relationship or nexus between the impact of the development and either the amount of the fee charged or the inclusionary requirement," Municipal Code § 15.94.080(A), App. at G-40, carries with it the sort of discretion that ought to allow for an immediate facial challenge in a court. In short, the dismissal of the facial claim based on the existence of a discretionary waiver provision is in conflict with the jurisprudence of this Court and the Fourth Circuit.

III

THE CONSTITUTION IS VIOLATED WHEN AN OWNER MUST RENT PROPERTY IN PERPETUITY AT A PRICE DETERMINED BY A ROTE FORMULA THAT BEARS NO RELATIONSHIP TO COSTS, ECONOMICS, OR UNANTICIPATED CAPITAL EXPENDITURES

Price control regulation violates the Due Process Clause, the Takings Clause, or both, if it provides no mechanism for adjusting the price in order to ensure that the regulated business receives a "fair return." This Court summarized the current state of the law of rate regulation in *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989), where it wrote:

> The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so "unjust" as to be confiscatory. *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 597 (1896) (A rate is too low if it is "so unjust as to destroy the value of [the] property for all the purposes for which it was acquired," and in so doing "practically deprive[s] the owner of property without due process of law"); *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942) ("By long standing usage in the field of rate regulation, the 'lowest reasonable rate' is one which is not confiscatory in the constitutional sense"); *FPC v. Texaco Inc.*, 417 U.S. 380, 391-392 (1974) ("All that is protected against, in a constitutional sense, is that the rates fixed by the Commission be higher than a confiscatory level"). If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation

> and so violated the Fifth and Fourteenth Amendments.

488 U.S. at 307-08.

The court below, however, found these considerations were not germane because "we are not aware of, any case that holds a housing developer is entitled to 'fair return' on his or her investment." App. at A-13. Furthermore, the court found the waiver to be dispositive "[s]ince City has the authority to completely waive a developer's obligations." *Id.* at A-14.

Unfortunately, the court below misconstrued both the nature of the Home Builders' complaint and the role of the waiver provision. It has allowed a scheme to proceed that denies landlords the right to receive a fair return on rental property and which conflicts with decisions of this Court.

The problem with the scheme here is not that the developers of residential rental units may or may not receive a fair return on their *development and construction* costs. The problem is that the ultimate owner of those rental units, at any time between now and the end of time (perpetuity), will have no opportunity to seek rent increases that are tied to anything other than the median income of Napa residents.

There is no mechanism at all for adjusting rents in accordance with changing economic circumstances, such as unanticipated capital expenditures, repair costs, or the inflation of labor and maintenance costs that are not matched by changes in Napa's median income. Any of these changes in costs or economic circumstances can quickly destroy a landlord's ability to obtain a fair return on an investment in rental property. Because the rent restrictions imposed by this ordinance are required to be in place "in perpetuity," it is highly probable that some event or events will occur between now and the end of time (or at least until the useful life of the buildings has ended)

that will, without a mechanism for a rent adjustment, deny an owner of rental housing a fair return.

The waiver mechanism is irrelevant to this difficulty. The waiver provision applies when a property owner can prove the lack of a nexus between development and the need for low-income housing; the waiver provision is not available for property owners who wish to claim that the lack of a rent adjustment mechanism fails to assure the owners of rental property a fair return in the future. Indeed, the waiver provision has no relevance at all in the future after the rental units are built and when the owners may be saddled with unanticipated and unrecoupable costs.

Home Builders alleges that the lack of any mechanism to ensure that owners of rental units obtain a fair rate of return violates the Due Process Clauses of the state and federal constitutions.[12] Home Builders did not allege that the property owners were entitled to a fair return at the construction phase, but only that they, or the ultimate owners of the rental units, be allowed to obtain a fair return in the future. As this Court's opinion in *Duquesne Light Co.*, and the cases cited therein, demonstrate, when a rate regulation results in a rate that is too low, the Constitution is violated. The complete lack of a mechanism that would allow the rents to be adjusted in the future to take into account changed circumstances makes the challenged ordinance in violation of the Due Process Clause.

In every other jurisdiction with rent control in the nation known to Petitioner, mechanisms exist that allow rent adjustments in order to ensure that landlords have a reasonable opportunity to obtain a fair return. Without such a mechanism, a rent control ordinance is void on its face.

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[12] *See, e.g.*, Complaint ¶¶ 34-37, Joint Appendix below at 10.

In *Mayes v. Jackson Township Rent Leveling Board*, 511 A.2d 589, 591 (N.J. 1986), *cert. denied*, 479 U.S. 1090 (1987), the New Jersey Supreme Court held:

> Stating the general principle applicable to these cases is easy. "[A] rent control ordinance must permit an efficient landlord to realize a 'just and reasonable return' on [the] property."

(Citation omitted.) The court admitted that it may be difficult to determine an appropriate formula for determining a "just and reasonable return." It is, of course, impossible to meet such a standard when, as here, rents can never be adjusted to account for changed economic circumstances.

Similarly, in New York Justice Cardoza held that

> [a] statute prescribing rates is one of continuing operation. It is an attempt by the legislature to predict for future years the charges that will yield a fair return. *The prediction must square with the facts, or be cast aside as worthless.* It must square with them in one year as in another, at the beginning but equally at the end.

Municipal Gas Co. of Albany v. Public Serv. Comm'n, 121 N.E. 772, 774 (N.Y. 1919) (emphasis added; citation omitted). In the present case, in contrast, rental rates will forever more be tied to a formula relating to the median income of Napa residents. The City of Napa and the court below never so much as asserted that a rental rate tied to the median income of residents had any relevance to a fair return. In contrast to Judge Cardoza's holding, this formula makes it virtually impossible to ensure a fair return at any time from now until the end of the useful life of the rental units.

The Massachusetts Supreme Court considered the formula required to ensure a fair return or "fair net operating income" in *Marshal House, Inc. v. Rent Control Board of Brookline*, 266

N.E.2d 876, 887-88 (Mass. 1971). It found that to be constitutional, a rent control ordinance requires fair return on investment as the standard rather than a fair return on the fair market value of the property. This holding is in conflict with the decision below, which requires no guarantee of a "fair net operating income" regardless of the standard.

The only contrary case comes from the wartime Federal Emergency Court of Appeals which held, that during the temporary war emergency, it would be too difficult to administer a requirement that landlords achieve a fair return on market value. *Wilson v. Brown*, 137 F.2d 348, 354 (Temp. Emer. Ct. App. 1943).

To summarize, the decision below is in manifest conflict with the holdings of this Court that were summarized in *Duquesne Light Co.* and with nearly every other jurisdiction that has assessed whether a rent control measure meets constitutional standards.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: December, 2001.

Respectfully submitted,

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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE
DISTRICT DIVISION FIVE

FILED
June 6, 2001
As Amended
July 2, 2001

HOME BUILDERS ASSOCIATION OF NORTHERN CALIFORNIA,	
Plaintiff and Appellant,	A090437
v.	(Napa County
CITY OF NAPA, et al.,	Superior Ct.
Defendants and Respondents,	No. 26-07228)
NAPA VALLEY COMMUNITY HOUSING, et al.,	
Intervenors and Respondents.	

Home Builders Association of Northern California (HBA) appeals from a judgment entered after the trial court sustained a demurrer and dismissed its complaint asserting a facial challenge to an inclusionary zoning ordinance that was enacted by the City of Napa (City). HBA contends primarily that the trial court erroneously applied Federal and California takings law. We disagree and will affirm the judgment.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II.C and II.E.

Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II.B.3, II.C through E.

I. FACTUAL AND PROCEDURAL BACKGROUND

City, like many other localities in California, has a shortage of affordable housing. This shortage has negative consequences for all of City's population, but causes particularly severe problems for those on the lower end of the economic spectrum. Manual laborers, some of whom work in the region's wine or leisure industries, are forced to live in crowded, substandard housing. There is a large, and growing population of homeless, including many families and teenagers. Workers from low income families increasingly are forced to live greater distances from their places of employment, which causes increased traffic congestion and pollution.

City formed the Napa Affordable Housing Task Force to address these problems. The task force was a broad based community group that included representatives from non-profit agencies, environmental groups, religious institutions, local industries, for-profit developers, and the local chamber of commerce. The purpose of the task force was to "study the issues surrounding affordable housing in the City of Napa and . . . make recommendations to the Housing Authority Commission."

The task force studied housing issues for several months. It formed subcommittees, conducted public hearings, and evaluated affordable housing solutions that had been enacted by other communities. Ultimately the task force recommended

that City enact an inclusionary housing ordinance[1] modeled after one that had been enacted by Napa County.

City responded by enacting the inclusionary zoning ordinance[2] that is at issue in the present appeal. The ordinance applies to all development in the city, including residential and non-residential.

The primary mandate imposed by the ordinance on residential developers is a requirement that ten percent of all newly constructed units must be "affordable" as that term is defined.[3] The ordinance offers developers two alternatives. First, developers of single-family units may, at their option, satisfy the so called inclusionary requirement through an "alternative equivalent proposal" such as a dedication of land, or the construction of affordable units on another site. Developers of multi-family units may also satisfy the 10 percent requirement through an "alternative equivalent proposal" if the City Council, in its sole discretion, determines that the proposed alternative results in affordable housing opportunities equal to or greater than those created by the basic inclusionary requirement.

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[1] An "inclusionary zoning" or "inclusionary housing" ordinance is one that requires a residential developer to set aside a specified percentage of new units for low or moderate income housing. (See Padilla, *Reflections on Inclusionary Housing and a Renewed Look at its Viability* (1995) 23 Hofstra Law Review 539, 540.)

[2] In fact, City enacted two ordinances to address the inclusionary housing problem. We will refer to the ordinances collectively as the "inclusionary zoning ordinance" or simply, "the ordinance."

[3] The definition of "affordable" in the ordinance is complex. In general, the term refers to an amount that could be paid by persons who live in a household that earns significantly less than the area median income.

As a second alternative, a residential developer may choose to satisfy the inclusionary requirement by paying an in-lieu fee. Developers of single-family units may choose this option by right, while developers of multi-family units are permitted this option if the City Council, again in its sole discretion, approves. All fees generated through this option are deposited into a housing trust fund, and may only be used to increase and improve the supply of affordable housing in City.

Developments that include affordable housing are eligible for a variety of benefits including expedited processing, fee deferrals, loans or grants, and density bonuses that allow more intensive development than otherwise would be allowed. In addition, the ordinance permits a developer to appeal for a reduction, adjustment, or *complete waiver* of obligations under the ordinance "based upon the absence of any reasonable relationship or nexus between the impact of the development and . . . the inclusionary requirement."

HBA is a non-profit corporation and association of builders, contractors, and related trades and professionals involved in the residential construction industry. In September 1999, HBA filed a complaint against City seeking to have the inclusionary zoning ordinance declared facially invalid. As is relevant here, HBA alleged the ordinance violated (1) the takings clauses of the Federal and State Constitutions, (2) the Mitigation Fee Act (Gov. Code, §§ 66000, et seq.), (3) the due process clause of the Federal Constitution, and (4) Proposition 218.

City demurred to the complaint arguing it was entitled to prevail as a matter of law. City supported its demurrer with nearly 700 pages of reports and materials that it had relied upon when adopting the ordinance.

In December 1999, the trial court allowed a group of persons and entities to intervene in the action in support of the ordinance.[4]

The intervenors joined City's demurrer.

The trial court sustained the demurrer without leave to amend, and entered judgment in favor of City and the intervenors. This appeal followed.

II. DISCUSSION

A. Introduction and Standard of Review

HBA contends the trial court erred when it sustained the demurrer to its complaint. In arguing City's inclusionary zoning ordinance is facially invalid, HBA again asserts the ordinance violates (1) the takings clauses of the Federal and State constitutions, (2) the Mitigation Fee Act (Gov. Code § 66000, et seq.), (3) the due process clause of the Federal Constitution, and (4) Proposition 218.

The standard of review we apply is familiar. On appeal from a judgment of dismissal after an order sustaining a demurrer, the appellate court reviews the record de novo, to determine whether the complaint states a cause of action as a matter of law. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) All facts properly pleaded are deemed to be true. (*Ibid.*)

With these principles in mind, we consider the arguments that have been advanced concerning each claim.

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[4] The intervenors were Napa Valley Community Housing, Non-Profit Housing Association of Northern California, Housing California, Patricia Domingo, Heather Clayton, Donna Simon, Hilda Avina, Rainy Stegall, and Hector Candelario.

B. Takings Issues

1. Is the Ordinance Facially Invalid?

HBA contends that City's inclusionary zoning ordinance is facially invalid because it violates the taking clauses of the Federal and State Constitutions.

A claimant who advances a facial challenge faces an "uphill battle." (*Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 U.S. 470, 495.) "'A claim that a regulation is *facially* invalid is only tenable if the terms of the regulation will not permit those who administer it to avoid an unconstitutional *application* to the complaining parties.'" (*San Mateo County Coastal Landowners' Assn. v. County of San Mateo* (1995) 38 Cal.App. 4th 523, 547, quoting *Tahoe-Sierra Preservation Council v. State Water Resources Control Bd.* (1989) 210 Cal.App.3d 1421, 1442.) This is because a facial challenge is predicated on the theory that "the mere enactment of the . . . ordinance worked a taking of plaintiff's property . . . ." (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 24.)

Here, City's inclusionary zoning ordinance imposes significant burdens on those who wish to develop their property. However the ordinance also provides significant benefits to those who comply with its terms. Developments that include affordable housing are eligible for expedited processing, fee deferrals, loans or grants, and density bonuses. More critically, the ordinance permits a developer to appeal for a reduction, adjustment, or *complete waiver* of the ordinance's requirements. Since City has the ability to waive the requirements imposed by the ordinance, the ordinance cannot and does not, on its face, result in a taking.

HBA contends the ordinance's waiver clause does not preclude a facial challenge because that clause improperly places the burden on the developer to prove that a waiver would be appropriate when the City has not established a justification

for the exactions mandated by the ordinance. According to HBA, allocating the burden in this way is inconsistent with *Dolan v. City of Tigard* (1994) 512 U.S. 374, 391, footnote 8. HBA misreads *Dolan*. Quite to the contrary, the Supreme Court stated in *Dolan*, that when evaluating the validity of generally applicable zoning regulations, it is appropriate to place the burden on the party who is challenging the regulation. (*Ibid.*) As we will discuss below, City's inclusionary zoning ordinance is a generally applicable legislative enactment rather than an individualized assessment imposed as a condition of development. Thus, the burden shifting standard described in *Dolan* does not apply.

2. Does the Ordinance Substantially Advance a Legitimate Interest?

The Fifth Amendment to the United States Constitution states that "private property [shall not] be taken for public use without just compensation." Article I, section 19 of the California Constitution contains similar language, stating that governmental entities must pay just compensation when they "take" private property for public use.

In *Agins v. Tiburon* (1980) 447 U.S. 255, the Supreme Court provided a test to determine whether a taking has occurred. The court said, "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land . . . ." (*Id.* at p. 260.)

Here, HBA contends that City's inclusionary zoning ordinance effects a taking under the first of these tests; i.e., that the ordinance is invalid because it fails to substantially advance legitimate state interests. We are unpersuaded.

First, we have no doubt that creating affordable housing for low and moderate income families is a legitimate state

interest. Our Supreme Court has said that the "assistance of moderate-income households with their housing needs is recognized in this state as a legitimate governmental purpose." (*Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 970.) This conclusion is consistent with repeated pronouncements from the state Legislature which has declared that "the development of a sufficient supply of housing to meet the needs of *all Californians* is a matter of statewide concern," (Gov. Code, § 65913.9, emphasis added) and that local governments have "a responsibility to use the powers vested in them to facilitate the improvement and development of housing to make adequate provision for the housing needs of *all economic segments of the community*." (Gov. Code, § 65580, subd. (d), emphasis added.) Indeed, Witkin lists 12 separate statutes that are "designed to stimulate the construction of low and moderate income housing by the private sector." (4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property § 54, p. 275; *id.* (2000 Supp.) § 54, p. 134.)

Second, it is that City's inclusionary zoning ordinance will "substantially advance" the important governmental interest of providing affordable housing for low and moderate income families. By requiring developers in City to create a modest amount of affordable housing (or to comply with one of the alternatives) the ordinance will necessarily increase the supply of affordable housing. We conclude City's ordinance "substantially advance[s] legitimate state interests." (*Agins v. Tiburon*, *supra*, 447 U.S. at p. 260.)

HBA's principal constitutional claim is that City's ordinance is invalid under *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825, and *Dolan v. City of Tigard*, *supra*, 512 U.S. 374.

In *Nollan* the court discussed the "substantially advance" test in the context of a governmental requirement that appellant property owners dedicate a portion of their beachfront property

to the public as a condition for obtaining a rebuilding permit. In the course of its discussion, the court said there must be an "essential nexus" between a condition imposed on the use of land, and the impacts caused by the proposed use. (*Nollan v. California Coastal Comm'n, supra*, 483 U.S. at p. 837.)

Dolan also involved dedications of property that were a condition for granting a development permit. There the court said that a "rough proportionality" standard "best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." (*Dolan v. City of Tigard, supra*, 512 U.S. at p. 391.)

HBA contends City's ordinance is invalid under *Nollan* and *Dolan* because there is no "essential nexus" or "rough proportionality" between the exaction required by the ordinance, and the impacts caused by development of property.

We reject this argument because *Nollan* and *Dolan* are inapplicable under the facts of this case. "[T]he intermediate standard of judicial scrutiny formulated by the high court in *Nollan* and *Dolan* is intended to address . . . land use 'bargains' between property owners and regulatory bodies—those in which the local government conditions permit approval for a given use on the owner's surrender of benefits which *purportedly* offset the impact of the proposed development. It is in this paradigmatic permit context—where the individual property owner-developer seeks to negotiate approval of a planned development—that the combined *Nollan* and *Dolan* test quintessentially applies." (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 868.) "But a different standard of scrutiny [applies] to development fees that are generally applicable through legislative action 'because the heightened risk of the "extortionate" use of the police power to exact

unconstitutional conditions is not present.'"[5] (*Santa Monica Beach, Ltd. v. Superior Court*, *supra*, 19 Cal.4th at p. 966, quoting *Ehrlich v. City of Culver City*, *supra*, 12 Cal.4th at p. 876.) "[I]ndividualized development fees warrant a type of review akin to the conditional conveyances at issue in *Nollan* and *Dolan*, whereas generally applicable development fees warrant the more deferential review that the *Dolan* court recognized is generally accorded to legislative determinations." (*Santa Monica Beach, Ltd. v. Superior Court*, *supra*, 19 Cal.4th at pp. 966-967.) The justification for these varying levels of scrutiny is founded in the nature of the two types of exactions. "It is one thing for courts to make a government agency adhere to its own justification for requiring the dedication of a particular portion of property as a condition of development; such adherence safeguards against the possibility that the justification is merely a pretext for taking the property without paying compensation. . . . But it is another thing for courts to require that a complex, generally applicable piece of economic legislation that will have many effects on many different persons and entities accomplish precisely the goals stated in a legislative preamble in order to preserve its constitutionality." (*Santa Monica Beach, Ltd. v. Superior Court*, *supra*, 19 Cal.4th at p. 972.)

Here, we are not called upon to determine the validity of a particular land use bargain between a governmental agency and a person who wants to develop his or her land. Instead we are faced with a facial challenge to economic legislation that is generally applicable to *all* development in City. We conclude the heightened standard of review described in *Nollan* and *Dolan* is inapplicable under these facts.

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[5] While the court in *Santa Monica Beach*, discussed the scope of *Nollan* and *Dolan* in the context of "development fees," the court has made clear that the same analysis applies whether a governmental entity requires the conveyance of property, or the payment of a fee. (See *Ehrlich v. City of Culver City*, *supra*, 12 Cal.4th at p. 876.)

3. Other Takings Issues

HBA advances two additional arguments on the takings issue.

First HBA contends that even if the heightened level of scrutiny set forth in *Nollan* and *Dolan* are inapplicable, City's inclusionary zoning ordinance is still invalid under California cases such as *Rohn v. City of Visalia* (1989) 214 Cal.App.3d 1463, *Whaler's Village Club v. California Coastal Com.* (1985) 173 Cal.App.3d 240, and *Liberty v. California Coastal Com.* (1980) 113 Cal.App.3d 491. These decisions are inapposite. The issue in each was the validity of an ad hoc condition that was imposed on an individual developer. None of them involved a facial challenge to a generally applicable zoning ordinance that imposed obligations on all development in a given area. We conclude *Rohn*, *Whaler's Village*, and *Liberty* are not applicable under the facts of this case.

HBA also contends that the inclusionary zoning ordinance is invalid because the lack of housing for low and moderate income families in City is the product of City's own prior restrictive land use policies.

HBA has not cited any authority to support the proposition that a zoning ordinance which tries to solve problems caused by prior legislative decisions is invalid, and case law is directly to the contrary. For example, in *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, the Supreme Court ruled that New York could enact a landmark preservation law that was designed to mitigate the effects of prior policies that permitted "large numbers of historic structures, landmarks, and areas" to be destroyed. (*Id.* at p. 108.) If New York can enact a landmark preservation law to remedy a shortage of historic buildings created by its prior policies, City can enact an inclusionary zoning ordinance even if its prior policies contributed to a scarcity of available land and a shortage of affordable housing.

C. Mitigation Fee Act

HBA contends the "inclusionary zoning law violates Government Code sections 66000 through 66022 . . . ." These statutes are commonly described as the Mitigation Fee Act. (See Gov. Code, § 66000.5.)

HBA's briefs on this issue are notably brief; HBA invites an analysis, but does not provide it. While HBA claims that City's ordinance violates the Mitigation Fee Act, its briefs do not discuss that issue. Instead they focus solely on whether it was appropriate to bring a facial challenge to any fees that might someday be paid under the ordinance. How the ordinance might violate the Mitigation Fee Act is not discussed or developed.

By framing its argument this way, HBA has forgotten to teather the procedural cart to the substantive horse. Even if we were to assume that a facial challenge is appropriate, this does not prove that City's ordinance violates the Mitigation Fee Act. In the absence of argument or authority that indicates City's ordinance is invalid under the Mitigation Fee Act, we deem the issue waived. (See *Kim v. Sumitomo Bank* (1993) 17 Cal.App. 4th 974, 979.)

D. Due Process

HBA contends the inclusionary zoning ordinance is facially invalid under the due process clause of the Federal Constitution because it "requires property owners who develop residential housing to sell or rent 10% of their units at prices or rents that are based entirely upon certain fixed percentages of the income levels of lower and very low-income households." Imposing such a requirement violates the due process clause, HBA argues, because "the inclusionary zoning law provides no mechanism to make a fair return for property owners who are forced to sell or rent units at an amount unrelated to market prices."

We doubt seriously that HBA is entitled to a "fair return" under the due process clause. The "fair return"' standard is commonly used to evaluate restrictions placed on historically regulated industries such as railroads and public utilities. (See, e.g., *Power Comm'n v. Pipeline Co.* (1942) 315 U.S. 575.) It has also been used to evaluate rent control ordinances. (See e.g. *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 679.)

However HBA has not cited, and we are not aware of, any case that holds a housing developer is entitled to "fair return" on his or her investment.

However we need not base our decision on this ground. First, it is not literally correct to say that City's ordinance "requires property owners who develop residential housing to sell or rent 10% of their units [to low income individuals]." Under the ordinance, any person who does not want to sell or rent a portion of his or her housing units to low income individuals may choose one of the alternatives, such as donating vacant land or paying an in-lieu fee. Thus HBA's argument is based on an incorrect premise.

Second, and more importantly, HBA's facial due process challenge must necessarily fail. As we have said, "'A claim that a regulation is *facially* invalid is only tenable if the terms of the regulation will not permit those who administer it to avoid an unconstitutional *application* to the complaining parties.'" (*San Mateo County Coastal Landowners' Assn. v. County of San Mateo*, *supra*, 38 Cal.App.4th at p. 547, internal citation omitted.) When an ordinance contains provisions that allow for administrative relief, we must presume the implementing authorities will exercise their authority in conformity with the Constitution. (See *Fisher v. City of Berkeley*, *supra*, 37 Cal.3d at p. 684.)

Here, as we have noted, City's ordinance includes a clause that allows city officials to reduce, modify or waive the requirements contained in the ordinance "based upon the absence of any

reasonable relationship or nexus between the impact of the development and . . . the inclusionary requirement." Since City has the authority to completely waive a developer's obligations, a facial challenge under the due process clause must necessarily fail.

HBA contends the waiver clause does not preclude a facial challenge because it does not state expressly that a waiver may be granted based on a lack of a "fair return." However the power of an agency to make adjustments to guarantee a fair return is "not limited to those literally granted by the ordinance . . . ." (*City of Berkeley v. City of Berkeley Rent Stabilization Bd.* (1994) 27 Cal.App.4th 951, 962.) When this standard is not expressly stated, it is "present by implication." (*Ibid.*)

E. Proposition 218

In November 1996, the voters approved Proposition 218 which added article XIII D to the California Constitution. Section 3, subdivision (a) of article XIII D states that "No tax, assessment, fee, or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership except . . . [¶] . . . [¶] . . . as provided by this article." Section 2, subdivision (e) defines a fee as "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service."

HBA contends the in-lieu fee option contained in City's inclusionary zoning ordinance violates Proposition 218 because the "ability to develop property in a reasonable manner is a right guaranteed by the state and federal Constitutions." Thus HBA contends the in-lieu fee option is invalid because it is imposed on "an incident of property ownership."

Our Supreme Court recently rejected this same argument in *Apartment Assn. of Los Angeles County, Inc. v. City of Los*

Angeles (2001) 24 Cal.4th 830. The issue there was the validity of a Los Angeles city ordinance that imposed an inspection fee on private landlords. The plaintiffs argued the fee was invalid under proposition 218. The Supreme Court rejected this argument because the fee was "imposed only on those landowners who choose to engage in the residential rental business, and only while they are operating the business." (*Id.* at p. 840.) The court ruled that under those circumstances, proposition 218 did not apply. As the court explained, "article XIII D, section 3, provides that '[n]o tax, assessment, fee, or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership except . . . [¶] . . . [¶] . . . as provided by this article.' (See also *id.*, § 2, subd. (e).) In other words, taxes, assessments, fees, and charges are subject to the constitutional strictures when they burden landowners as *landowners*. The ordinance does not do so: it imposes a fee on its subjects by virtue of their ownership of a business—i.e., because they are landlords. What plaintiffs ask us to do is to alter the foregoing language—changing 'as an incident of property ownership' to 'on an incident of property ownership.' But to do so would be to ignore its plain meaning—namely, that it applies only to exactions levied solely by virtue of property ownership. We may not interpret article XIII D as if it had been rewritten." (*Id.* at pp. 841-842, fn. omitted.)

The in-lieu fee option contained in City's inclusionary zoning ordinance only comes into play if a land owner elects to develop his property. It is not imposed "solely by virtue of property ownership." (*Apartment Assn. of Los Angeles v. City*

of Los Angeles, *supra*, 24 Cal.4th at p. 842.) The fee does not violate proposition 218.

III. DISPOSITION

The judgment is affirmed.

JONES, P.J.

We concur:

STEVENS, J.

SIMONS, J.

Appendix B–1

Court of Appeal, First Appellate District, Division Five

No. A090437

S099170

Filed September 12, 2001

IN THE SUPREME COURT OF CALIFORNIA

En Banc

HOME BUILDERS ASSOCIATION OF NORTHERN CALIFORNIA, Plaintiff and Appellant,

v.

CITY OF NAPA et al., Defendants and Respondents;

NAPA VALLEY COMMUNITY HOUSING et al., Interveners and Respondents.

Petition for review DENIED.

GEORGE,
Chief Justice

Appendix C–1

COURT OF APPEAL, FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 5
Filed June 27, 2001

HOME BUILDERS ASSOCIATION
OF NORTHERN CALIFORNIA,

Plaintiff and Appellant,

v.

CITY OF NAPA, et al.,

Defendants and Respondents.

A090437

Napa County No. 2607228

BY THE COURT:

The petition for rehearing is denied.

Date: JUN 27 2001 JONES, P.J. P.J.

Appendix D–1

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

FILED July 2, 2001

HOME BUILDERS ASSOCIATION OF NORTHERN CALIFORNIA, Plaintiff and Appellant, v. CITY OF NAPA et al., Defendants and Respondents, NAPA VALLEY COMMUNITY HOUSING et al., Intervenors and Respondents.	A090437 (Napa County Super. Ct. No. 26-07228) **ORDER MODIFYING OPINION (NO CHANGE IN JUDGMENT)**

THE COURT:

Upon the court's own motion, the opinion filed June 6, 2001, is modified as follows:

1. On page 1 of the opinion, first footnote which states, "Pursuant to California Rules of Court, rules 97(b) and 976.1, this opinion is certified for publication with the exception of parts II.B.3, II.C through E" is deleted and replaced with the following footnote:

> Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II.C and II.E.

Appendix D–2

This modification does not change the judgment.

Dated: JUL 02 2001 JONES, P.J., P.J.

Appendix E–1

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF NAPA

Filed April 17, 2000

HOME BUILDERS ASSOCIATION OF NORTHERN CALIFORNIA,

Plaintiff and Petitioner,

v.

CITY OF NAPA AND ALL PERSONS INTERESTED IN THE MATTER OF THE VALIDITY OF RESOLUTION NO. R1999/161, CITY OF NAPA ORDINANCE NO. 01999/19, CITY OF NAPA ORDINANCE NO. 01999/20, AND CITY OF NAPA MUNICIPAL CODE 15.94,

Defendants and Respondents,

/

NAPA VALLEY COMMUNITY HOUSING, a California nonprofit corp.; NON-PROFIT HOUSING ASSOCIATION OF NORTHERN CALIFORNIA, an unincorporated association; HOUSING CALIFORNIA, a California nonprofit corp.; PATRICIA DOMINGO; HEATHER CLAYTON; DONNA SIMON; HILDA AVINA; RAINY

CASE NO.: 26-07228

JUDGMENT

STEGALL; AND HECTOR CANDELARIO,

Real Parties in Interest and Intervenors./

This action came on for hearing on Defendant City of Napa's demurrer to the Action for Declaratory Relief, Determination of Invalidity, and Petition for Writ of Mandate of the Home Builders Association of Northern California on January 14, 2000, before the Honorable Scott W. Snowden. Kirk E. Trost, Esq. and Thomas B. Brown, Esq., appeared as attorneys for the City of Napa; Richard A. Marcantonio, Esq., Michael Rawson, Esq., and Dara L. Schur, Esq. appeared as attorneys for Intervenors/Real Parties in Interest Napa Valley Community Housing, Non-profit Housing Association of Northern California, Housing California, Patricia Domingo, Heather Clayton, Donna Simon, Hilda Avina, Rainy Stegall, and Hector Candelario; James S. Burling, Esq. appeared as attorney for Plaintiff and Petitioner Home Builders Association of Northern California.

After hearing on the demurrer, the matter was submitted to the Court for ruling. The Court, having read and considered the supporting and opposing points and authorities and the matters submitted to it for judicial notice, and having heard and considered the arguments of counsel, and good cause appearing therefor, the Court sustained the demurrer without leave to amend on the grounds that each and every cause of action and/or claim in Plaintiff and Petitioner's action for declaratory relief, determination of invalidity, and petition for writ of mandate, fails to state facts sufficient to constitute a cause of action.

IT IS ADJUDGED that:

1. Judgment be entered in favor of Defendant and Respondent City of Napa and Real Parties in Interest and

Intervenors, and against Plaintiff and Petitioner Home Builders Association of Northern California;

2. Plaintiff and Petitioner Home Builders Association of Northern California recover nothing from Defendant and Respondent City of Napa, or from Real Parties in Interest and Intervenors;

3. Plaintiff and Petitioner Home Builders Association of Northern California's requests for declaratory relief, determination of invalidity, and petition for writ of mandate are denied; and

4. Defendant and Respondent, and Real Parties in Interest and Intervenors shall recover against Plaintiff and Petitioner costs according to memoranda of costs to be filed with the Court.

DATED: 4/13, 2000

W. SCOTT SNOWDEN
JUDGE OF THE SUPERIOR COURT

APPROVED AS TO FORM:

/s/ James S. Burling 3-29-00
JAMES S. BURLING
Counsel for Plaintiffs

Appendix F–1

ORDINANCE O1999/19

AN URGENCY ORDINANCE OF THE CITY OF NAPA, COUNTY OF NAPA, STATE OF CALIFORNIA, ADDING CHAPTER 15.94 TO THE NAPA MUNICIPAL CODE CREATING AND ESTABLISHING A HOUSING TRUST FUND, A HOUSING IMPACT FEE ON NON-RESIDENTIAL DEVELOPMENT AND ESTABLISHING AN INCLUSIONARY IN-LIEU FEE REQUIREMENT FOR RESIDENTIAL DEVELOPMENT PROJECTS

Be it ordained by the City Council of the City of Napa as follows:

Section 1. With respect to non-residential development, the Council finds as follows:

A. New office, retail, industrial, hotel, warehouse, wine production and other non-residential uses (hereinafter referred to as "non-residential uses" or "non-residential development projects") in the City of Napa ("City") have been, and continue to be, a major factor in attracting new employees to the region. A number of these employees and their families reside, or will reside, in the City of Napa. These new employees and their families create a need for additional housing in the City of Napa.

B. Traditionally these non-residential uses have benefited from a supply of housing for their employees available at competitive prices and locations close to the place of employment. However, in recent years, the supply of housing has not kept pace with the demand for housing created by these new employees and their families, if this shortage were to grow or continue, employers would have increasing difficulty in locating in or near the City of Napa due to problems

associated with attracting a labor force. Employees would be unable to find appropriate housing in the area, and accordingly would be forced to commute long distances. This situation would adversely affect their quality of life, consume limited energy resources, increase congestion on already overcrowded highways and have a negative impact on air quality.

C. The competition for housing is especially acute with respect to households of low income (those households with incomes of 80% or below median income for Napa County). An identifiable portion of the new employees attracted to the City of Napa by new non-residential development will live in low and very low income households and will therefore compete with present residents for scarce affordable housing units in the City. Increasing the production and availability of low-income housing is especially problematic. Prices and rents for housing affordable to households of low and very low income remain below the level needed to attract new construction. This is even more true for households of very low income (those with incomes 50% or below median income for Napa County). Federal and State housing finance and subsidy programs are not sufficient by themselves to satisfy the low-income housing requirements associated with this employment.

D. On November 17, 1992, the Council adopted the Housing Element of the City of Napa General Plan. The Housing Element calls for the provision of additional housing for all sectors of the population, to accommodate the demands of both existing and new residents attracted to the region by increased employment. The Housing Element also provides that the City should make special efforts to encourage an increased supply of housing affordable to low and very low income households. More specifically, the City of Napa within its Housing Element, committed itself to the establishment of a City Inclusionary Housing Program and an Industry-Housing Linkage Program as key elements of its plan to help ensure that

housing will be available for all economic segments, as required by State law.

E. The City, with assistance from the NCCDC Affordable Housing Task Force and the Jobs-Housing Nexus Study Advisory Committee, studied housing needs throughout all jurisdictions, and the financial mechanisms available to address those needs, in Napa County. The resultant City of Napa and Napa County Jobs-Housing Nexus Study, September 1992, updated as of February 16, 1999 ("Nexus Report"), which is hereby incorporated by reference, examined the connection between non-residential development projects and the housing needs of moderate, low and very low income households. The Nexus Report concluded that a clear nexus can be established between the employees of various commercial and industrial buildings or land use types and the number of moderate, low and very low income employee households that are directly associated with such buildings and that will accordingly impact the housing market in and around Napa City. The Nexus Report further quantified the share of this need represented by low and very low income households.

F. Non-residential development brings in new employees, a significant percentage of those employees will live in the City, and that this number yields a certain number of households from which a definable number will be of low or very low income. Adjustments may be made to this number of households to take into account household size, multiple earner households, previously housed employees, etc., to yield the approximate per square foot contribution each employment activity contributes to the net new need for a housing subsidy. Based on the Nexus Report, each additional square foot of office development creates a need for low-income housing assistance in an amount of $17.65; retail development creates a need of $17.10 per square foot; industrial development creates a need of $6.52 per square foot; hotel development creates a need of $10.23 per square foot; warehouse development creates

a need of $2.49 per square foot; and the development of wine production facilities creates a need of $6.52 per square foot.

G. The City housing fee is established to implement the goals and objectives of the City of Napa General Plan, including the Housing Element and related environmental documents, the Napa City General Plan Environmental Impact Report, the NCCDC Affordable Housing Finance Task Force report and recommendations and the Nexus Report, together with the reports appended thereto or referenced therein quantifying the nexus between development and low-income housing need. Further to mitigate the impacts caused by new non-residential development in the city of Napa that is appropriate to impose some of the cost of the increased burden of providing housing for low and very low income households necessitated by such non-residential development directly upon the sponsors of the development. The imposition of a housing impact fee is an appropriate means to accomplish this purpose. However, the Council recognizes that establishing a fee at the upper range of the identified burden could have a negative effect on the City's ability to compete in the regional market for non-residential development projects. Thus, in calculating the amount of the housing impact fee, the Council has carefully weighed other factors in addition to the simple calculation of contribution. These include impact of the fee on construction costs, the need to foster the City's competitive position, special factors and hardships associated with certain types of development, and legal issues. Any increases in such fees in the future should consider these same criteria. In view of the numerous assumptions which must attend any such studies and conclusions, the Council has determined that the fee requirements will be set well below the calculated cost of providing market rate low-income housing to persons attracted to the City by corresponding employment opportunities. Further, in order to reduce the initial impact of these fees on the development

community, the Council has determined to phase the fee program in over time.

H. Most non-residential land uses in the City clearly fall within one of the six basic use types studied in the Nexus Report, and are charged a fee accordingly in this ordinance. In a limited number of situations, the fee must be based on a project-by-project determination due to insufficient information as to the general characteristics as to that type of use or special attributes which make building size an inappropriate indicator of employee density.

I. It is recognized that it is inappropriate to impose this housing fee requirement on certain types of non-residential uses because the fee would violate previous development agreements or other quasi-contractual agreements, or is preempted by state law; or because special characteristics of the use otherwise mitigate the impacts or are in themselves mitigation measures to assist the same low-income population to which this ordinance is addressed or because it can be determined that the use categorically will have few or no employees, thus negating the required nexus.

J. One of the purposes of this ordinance is to establish a feasible means by which developers of non-residential development projects assist in increasing the supply of low and very low income housing. The housing fee requirements contained in this ordinance are designed to create a rational relationship between the amount of housing need created by the employment use and the size of the fee, taking into account the impact of such fee on housing construction costs and economic feasibility.

K. The need to provide safe and sanitary dwelling accommodations to persons of low and moderate income is a matter of Citywide concern and represents a responsibility that should be borne by all sectors of the community. The enactment of a housing fee for non-residential development

only partially addresses the total impacts caused by non-residential developments and is intended as one part of the City's multi-faceted approach to affordable housing problems. Further regulatory changes to encourage the production of low-income housing will also be considered to address the existing and future need.

Section 2. With respect to residential development, the City Council finds and declares as follows:

A. Rental and owner-occupied housing in the City has become more and more expensive over time. Housing costs have gone up faster than incomes for many groups in the community.

B. Many persons who cannot afford housing in the City of Napa work in the City, have grown up or have family ties in the City, already live and work in the City but must move because housing is no longer affordable, or wish to live in the City for other reasons.

C. Federal and State government programs do not provide nearly enough affordable housing or subsidies to satisfy the housing needs of low or moderate income households who want or need housing in the City. Newly constructed housing is available in the City, with rare exceptions, only at prices which low and moderate income households cannot afford to pay. This problem has been exacerbated in the past by the fact that local government has at times failed to take a sufficiently active role in the affordable housing effort.

D. Rising land prices have been a key factor in preventing development of new affordable housing. New market rate housing construction in the City aggravates the existing shortage of affordable housing by absorbing the supply of available residential land. This not only reduces the supply of land for affordable housing but further increases the price of remaining residential land. At the same time, new housing

contributes to the demand for goods and services in the City, increasing local employment at wage levels which often do not permit employees to afford housing in the City.

E. Rising land prices and the resultant lack of affordability of housing for local residents and people working in the City are further exacerbated by the high demand for second homes, luxury homes and housing for new residents who commute to the greater Bay Area to work. The use of limited residential land for these purposes further increases the price of remaining residential land.

F. The desirability of the City as a place for second homes, luxury homes and as a bedroom community for workers in the greater Bay Area labor market results from strong agricultural protection and open space policies resulting in a desirable living environment which in turn makes housing affordability for local residents who work in local industries even more difficult to achieve. The City's General Plan contains policy statements favoring the protection of agriculture and open space in the County and directing housing and other urban uses to the urban areas, through the use of a Rural Urban Limit Line (RUL) to denote limits on urban development. These factors and an observed pattern of substantial remodels and demolition/replacement in agricultural areas are probably related; remodeled and replacement dwellings often eliminate older residential units that can economically provide more affordable housing. High percentages of newly constructed or remodeled homes in the upper end of the housing market further exacerbate the affordable housing problem by creating greater needs for many services typically provided by low-income employees.

G. Because neither the private market nor the public sector has as yet provided the levels of housing affordability necessary for the maintenance of a balanced community, local government must take an active lead to insure an adequate

supply of housing for residents and working people of all income levels.

H. The citizens of the City wish to retain a balanced community, with housing available to low and moderate income households. The City agrees with the established policy of the State of California that each community should make available an adequate supply of housing to persons at all economic levels. The City's use of its police power to regulate housing production in ways designed to achieve such a mix of units in the community is appropriate. As stated above, the Council has adopted the Housing Element of the City of Napa General Plan which supports the provision of additional housing for all sectors of the population, with an emphasis on the increased supply of housing affordable to low and very low income households, and calls for the establishment of an Inclusionary Housing program.

I. A balanced community is only possible if part of the new housing built in the City of Napa is affordable to low and moderate income households. Amending the land use regulations of the City to require builders of new housing to include some housing affordable to low or moderate income households, or to otherwise contribute to the effort to increase the supply of affordable housing in the City, is fair, not only because new development contributes to the shortage of affordable housing, but also because the land use regulations of the City in regard to new housing in the City should be consistent with the community's goal of .providing an adequate supply of housing for residents and working people of all income levels. Further in order to mitigate the impacts caused by new residential development in the City of Napa, it is appropriate to impose some of the cost of the increased burden of providing housing for low and very low income household directly upon the sponsors of the development contributing to the shortage of affordable housing.

J. The Council shall encourage the building and availability of affordable housing in the City by providing incentives and reducing the constraints on such development in the community. In this regard, the Council intends to consider such things as the establishment of public/private partnerships and the provision of incentives to the building community as provided by law and in the Housing Element of the City of Napa General Plan.

K. Maintaining the affordability of units constructed under this ordinance best serves the goal of assuring a continuing supply of affordable housing for local residents and people who work in the City of Napa but cannot afford to live here. If affordable units are not restricted so as to continue to be affordable at the time of resale, then such units will become market rate units within a relatively short period of time and, with the limited supply of residential land combined with increasing local land and building costs, the units will not be replaceable.

L. The requirements of this ordinance are minimum requirements. The City reserves the right to require additional measures to further affordable housing to the extent it has authority to do so without respect to this ordinance. As mentioned above, the efforts contained in this ordinance are simply one aspect of the City's developing strategy to address affordable housing needs on a variety of fronts.

M. Pursuant to Government Code Section 65913.2, the City Council has considered, the effects of these actions on the City's housing needs as established in the Housing Element of the General Plan.

Section 3. Chapter 15.94 is hereby added to the Napa Municipal Code to read as follows:

Chapter 15.94

CITY OF NAPA HOUSING TRUST FUND, HOUSING IMPACT FEE AND INCLUSIONARY/IN LIEU FEE REQUIREMENTS

Sections:

15.94.010 Purpose
15.94.020 Definitions
15.94.030 Housing Trust Fund
15.94.040 Non-residential Development Project Housing Impact Fee
15.94.050 Residential Development Inclusionary/In-lieu Fee requirements
15.94.060 Enforcement provisions
15.94.070 Annual review
15.94.080 Adjustment

15.94.010 Purpose.

The purpose of this chapter is to establish a Housing Trust Fund, a Housing Impact Fee on developers of non-residential development projects in the City of Napa, and an inclusionary requirement or an in-lieu fee on developers of residential development projects to mitigate the impacts caused by these development projects on the additional demand for more affordable housing and rising land prices for limited supply of available residential land. The fees will be used to defray the costs of providing affordable housing for very low, low, and moderate income households in the City of Napa. The fees and inclusionary requirements required by this chapter do not replace other regulatory, development and processing fees or exactions, funding required pursuant to a development agreement or reimbursement agreement; assessments charged

pursuant to special assessments or benefit assessment district proceedings, etc., unless so specified.

15.94.020 Definitions

As used in this chapter:

A. "Addition" shall mean an extension or increase in floor area of existing development project.

B. "Affordable rent" shall mean monthly rent, including tenant paid utilities allowances as determined by the Housing Director and all fees for housing services, that do not exceed thirty percent (30%) of eighty percent (80%) of area median income for lower income households. For very low-income households affordable rents are monthly rents that do not exceed thirty percent (30%) of fifty percent (50%) of area median income. In the case where the applicant is requesting a density bonus under chapter 17.84 of the Napa Municipal Code or where the applicant is requesting direct financial assistance requiring a different rent, "affordable rent" for lower income households, shall mean monthly rents that do not exceed thirty percent (30%) of sixty percent (60%) of area median income. Affordable rent shall be based on presumed occupancy levels of one person in a studio unit, two persons in a one bedroom unit, three persons in a two bedroom unit, and one additional person for each additional bedroom thereafter.

C. "Affordable sales price" shall mean the maximum purchase price that will be affordable to the specified target income household. A maximum purchase price shall be considered affordable only if each monthly owner-occupied housing payment is equal to or less than one-twelfth of 30% of income for the specified target income household. In setting the affordable sales price, realistic assumptions regarding down payment, mortgage interest rate and term will be so that targeted income families can reasonably qualify. Affordable sales price shall be based upon presumed occupancy levels of

one person in a studio unit, two persons in a one bedroom unit, three persons in a two bedroom unit, and one additional person for each additional bedroom thereafter.

D. "Affordable units" shall mean and be limited to those dwelling units which are required to be rented at affordable rents or purchased at an affordable sales price to specified households as described in Section 15.94.050.

E. "Annual household income" shall mean the combined gross income for all adult persons living in a dwelling unit as calculated for the purpose of the Section 8 program under the United States Housing Act of 1937, as amended, or its successor.

F. "Building permit" shall mean a permit issued pursuant to Chapter 15.08 of Title 15 of the Napa Municipal Code.

G. "Chief building official" shall mean the chief building official of the City of Napa, or the designee of such individual.

H. "City" shall mean the incorporated areas of the City of Napa.

I. "Concession" or "incentive" shall have the same meaning as set forth in Chapter 17.04 of the City of Napa Municipal Code.

J. "Construction costs" shall mean the estimated cost per square foot of construction, as established by the building department of the City of Napa for use in the setting of regulatory fees and building permits, multiplied by the total square footage, minus the garage floor area, to be constructed.

K. "Developer" shall mean every person, firm, or corporation constructing, placing, or creating new non-residential or residential development directly or through the services of any employee, agent, independent contractor or otherwise.

L. "Discretionary permit" shall mean any permit or license issued by the City of Napa for a project which requires the exercise of judgment or deliberation wherein the City decides to either approve or disapprove a particular activity in accordance with applicable laws, including but not limited to use permits, and the approval or modification of tentative, or tentative parcel maps pursuant to Title 16 of the Napa Municipal Code.

M. "Dwelling unit" shall have the meaning set forth in Chapter 17.04 of the City of Napa Municipal Code.

N. "Gross square feet floor area" means the sum of the gross horizontal floor areas of a building measured from the exterior face of exterior walls, or from the center line of a wall separating two buildings. In cases where no walls exist, the gross horizontal floor area shall be that area covered by the roof excluding two feet on each side of the structure for a standard roof projection. Outside areas used for sales and/or display may also be considered (e.g., plant nurseries, building materials, auto sales, wine production, etc.) when the planning director determines that the use of the outside area significantly contributes to the employee density of the building. For purposes of the requirements of Section 15.94.050, the square footage of any tank or wine crush pad or similar non-walled wine related structure shall be included in the gross square feet of a non-residential development project.

O. "Housing Board" shall mean the Housing Trust Fund Board established pursuant to Section 15.94.030.

P. "Housing director" shall mean the housing director of the Housing Authority of the City of Napa or the designee of such individual.

Q. "Housing Fund" shall mean the City of Napa Affordable Housing Trust Fund established pursuant to Section 15.94.030.

R. "Housing Impact Fee" shall mean the fee established pursuant to Section 15.94.040 for non-residential development projects.

S. "Housing In-lieu Fee" shall mean the fee established pursuant to Section 15.94.050 for residential development projects.

T. "Low-income households" are those households with incomes of up to 80% of median income.

U. "Market rate units" shall mean dwelling units in a residential project which are not affordable units.

V. "Median income" shall mean the median income, adjusted for family size, applicable to Napa County as published annually pursuant to Title 25 of the California Code of Regulations, Section 6932 (or its successor provision) by the United States Department of Housing and Urban Development.

W. "Moderate income households" are those households with incomes of up to 120% of median income.

X. "Monthly owner-occupied housing payment" shall be that sum equal to the principal, interest, property taxes, homeowner's insurance and homeowner's association dues paid on an annual basis divided by 12.

Y. "Non-residential development project" shall mean a project for the construction, addition, or placement of a structure which is for non-residential in such land use categories such as commercial, office industrial, etc. and shall include that portion of a mixed or combined use project which includes the construction, addition or placement of a structure for non-residential use in such land use categories.

Z. "Planning director" shall mean the director of the City of Napa planning department or the designee of such individual.

AA. "Residential development project" shall mean a project for the construction or placement of any dwelling unit in a permanent location, or the subdivision of land which is planned, designed, or used for the following land use categories:

1. Single-family residential: This category consists of single-family detached units and duplexes.

2. Multi-family residential: This category consists of buildings containing three (3) or more dwelling units and mobile home parks.

BB. "Very low-income households" are those households with incomes of up to 50% of median income.

15.94.030 Housing Trust Fund

A. There is hereby established the City of Napa Affordable Housing Trust Fund (the "Housing Fund"). Separate accounts within such Housing Fund may be created from time to time to avoid commingling as required by law or as deemed appropriate to further the purposes of the Fund.

B. The Housing Fund shall be administered by the Housing Director who shall have the authority to govern the Housing Fund consistent with this chapter, and to prescribe procedures for said purpose, subject to approval by the Council.

C. A Housing Trust Fund Board (the "Housing Board") is hereby established. The composition, size, term, decision-making authority and other organizational features of the Housing Board shall be as determined by resolution of the council. To the extent permitted by law and determined by resolutions of the council and Napa County Board of Supervisors, the Housing Board shall be an advisory joint City/County Housing Board with final funding decisions made by the appropriate legislative body on expenditure of monies from their respective Housing Funds. The Housing Board shall

biannually develop a Housing Assistance Plan Program and Financing Strategy, subject to approval by the council, to further define and prioritize the uses of the monies in the Housing Fund. The Plan shall be consistent with the City's Adopted Consolidated Plan.

D. Purposes and Use of Funds.

1. Monies deposited in the Housing Fund along with any interest earnings on such monies shall be used solely to increase and improve the supply of housing affordable to households of moderate, low and very low income households; including, but not limited to acquisition of property and property rights, cost of construction including costs associated with planning, administration, and design, as well as actual building or installation, as well as any other costs associated with the construction or financing of affordable housing; reimbursement to the City for such costs if funds were advanced by the City from other sources; and reimbursement of developers or property owners who have been required or permitted to install facilities which are beyond that which can be attributed to a specific development. To the maximum extent possible, all monies should be used to provide for additional affordable housing and services. Monies may also be used to cover reasonable administrative expenses not reimbursed through processing fees, including reasonable consultant and legal expenses related to the establishment and/or administration of the Housing Fund and reasonable expenses for administering the process of calculating, collecting, and accounting for inclusionary fees and any deferred City fees authorized by this section. No portion of the Housing Fund may be diverted to other purposes by way of loan or otherwise.

2. Monies in the Housing Fund shall be used in accordance with the priorities identified by the Housing Assistance Plan Program and Financing Strategy to construct, acquire, rehabilitate or subsidize very low, low and moderate

income housing and/or to assist other governmental entities, private organizations or individuals in the construction, rehabilitation, reimbursement of City advanced funds, reimbursement of developer supplied infrastructure capacity, location or subsidy of very low, low and moderate income housing. To the extent possible as determined by the Council, monies shall be targeted to benefit households at or below 60% of Median Income in Napa County. Monies in the Housing Fund may be disbursed, hypothecated, collateralized or otherwise employed for these purposes from time to time as the housing director and City council determine is appropriate to accomplish the purposes of the Housing Fund. These uses include, but are not limited to, assistance to housing development corporations, equity participation loans, grants, pre-home ownership co-investment, pre-development loan funds, participation leases, or other public/private partnership arrangements. The Housing Fund monies may be extended for the benefit of rental or owner occupied housing or housing services.

3. Expenditures by the housing director from the Housing Fund shall be controlled, authorized and paid in accordance with general city budgetary policies. Execution of contracts related to the use or administration of Housing Fund monies shall be in accordance with standard council policy.

E. Location of Housing Units and Housing Services to be Assisted With Housing Fund Monies.

1. The Housing Board shall develop, for council approval, criteria for the location of the housing units to be assisted with Housing Fund monies. One of the purposes of these criteria shall be to help ensure that Housing Fund monies are used to assist the city in meeting its fair share housing goals as set forth in the Housing Element of the City of Napa General Plan.

2. With respect to monies generated by the Housing impact Fee established by Section 15.94.050, these criteria shall

also consider a reasonable geographical linkage between the non-residential development projects subject to such fee and the housing assistance provided with the Housing Fund monies collected in connection with such projects, such that those receiving the housing assistance could reasonably commute to the commercial locations.

15.94.040 Non-Residential Development Project Housing Impact Fee.

A. Application.

A Housing Impact Fee is hereby imposed on all developers of non-residential development projects. Notwithstanding the foregoing, this fee shall not apply to developers of non-residential projects which fall within one or more of the following categories:

1. Projects that are the subject of development agreements currently in effect with the city, approved prior to the effective date of this chapter where such agreements expressly preclude the city from requiring compliance with this type of housing fee program; or

2. The non-residential uses are set forth either in a building permit application accepted as complete by the city prior to 5:00 p.m. on January 5, 1999, or in a use permit or similar discretionary approval approved prior to 5:00 p.m. on January 5, 1999; however any extension or modification of such approval or permit after such date shall not be exempt; or

3. That portion of a project located on property owned by the State of California, the United States of America or any of its agencies used exclusively for governmental or educational purposes; or

4. A project to the extent it has received a vested right to proceed without payment of housing impact fees pursuant to state law; or

5. Projects operated by nonprofit organizations which provide food storage, meal service and/or temporary shelter to the homeless; or

6. Projects for which no nexus can be established; or

7. Projects for uses labeled "Exempt" in Table 2 of this Section; or

8. Any building which is damaged or destroyed by fire or natural catastrophes so long as the square footage of the building remains the same.

B. Payment of fee.

Unless otherwise preempted by law the Housing Impact Fee shall be paid prior to the issuance of a building permit; or upon execution by the developer and owner, if different, of the city's secured building agreement recorded against the property, at the time of final inspection/Certificate of Occupancy. The housing director is hereby authorized to execute such agreements on behalf of the city.

C. Calculation of Housing Impact Fee.

1. The Housing Impact Fee for non-residential development projects shall be charged on a per square foot basis for all new gross floor area, including all additions where floor area is increased, with a specific per square foot amount set for each nonresidential use type identified in Table 1 below. The amount and calculation for each such fee shall be established by resolution of the City Council. Gross floor area is determined by calculating the combined area for all floors in accordance with the definition of "Gross square feet floor area" contained in Section 15.94.020. If the non-residential development project is in whole or part a replacement for space previously on the site, but demolished within one year prior to the filing of the application for the new construction or remodel, credit shall be

given for the space demolished or to be demolished at the rate applicable to the prior use of that space.

TABLE 1

HOUSING IMPACT FEE REQUIREMENT

Type of Use
Office
Hotel
Retail
Industrial
Warehouse (30,000 to 100,000 square feet)*
Warehouse (over 100,000 square feet)
Wine Production

**Warehouse uses of under 30,000 square feet shall be treated as industrial uses.*

2. In calculating the fee, the chief building official shall use those fees of Table 1 and Table 2 in effect by resolution of the City Council at the time of the issuance of the building permit or if no building permit is required, at the time of issuance of a use or other discretionary permit. In the case of large, mixed-use development projects involving the simultaneous construction of different structures and/or different uses, the categories in Table 2 and the types of uses in Table 1 may be used to create a mixed fee to be collected for all uses in the project. In that case, the fee shall be designed to approximate the revenue which would have been collected had the appropriate type of use category in Table 1 been applied to each individual portion of the project.

3. The type of use subject to the Housing Impact Fee will be determined in the following situations based on a case-by-case calculation of employee density:

a. In the case of uses listed as "Special" in Table 2.

b. In the case of a use which does not fall into one of the uses listed in Table 2 and the housing director determines that (i) the building size is an inappropriate indicator of employee density, or (ii) insufficient generalized information is available to permit a determination that the use falls within one of the use categories listed in Table 2. In the case of uses involving one or fewer employees, which uses shall be exempt from the fee requirement.

c. Upon the remodeling of the building to add additional square footage, the appropriate Housing Impact Fee shall be paid only on the additional square footage.

4. The housing director's determination of employee density pursuant to subsection 3 shall be based on: data concerning anticipated employee density for the project submitted by the applicant; employment surveys or other research on similar uses submitted by the applicant or independently researched by the housing director; or any other data or information the housing director determines relevant. Any application for a non-residential development project where a special fee determination is requested shall be accompanied by information sufficient to enable the housing director to make a determination of employee density pursuant to this subsection.

TABLE 2

NON-RESIDENTIAL LAND USE MATRIX WITH SPECIAL CATEGORICAL FEE DETERMINATIONS AND EXEMPTIONS

Non-Residential Use	Office	Retail	Warehouse	Industrial	Hotel/ Motel	Wine	Special Fee	Exempt
A. Hotels, Motels and bed-and-breakfast inns					X			
B. Commercial Uses General retail and personal service uses including integrated commercial centers.		X						
Furniture, appliance, household equipment; office equipment and sales, service and repair of bulk goods		X						

Non-Residential Use	Office	Retail	Warehouse	Industrial	Hotel/ Motel	Wine	Special Fee	Exempt
Service commercial and heavy commercial uses (building materials, contractor yard, tool rental, bus terminals, print shops, auto parts shops, janitorial services, etc.				X				
Gas station, service/auto repair including paint and auto body shops.		X						
Eating and drinking establish-ments.		X						
Commercial amusement and recreation uses.							X	
Commercial plant nurseries.				X				
C. Office Uses Banking, savings and loan associations; pro-fessional, business and administrative offices.	X							

Non-Residential Use	Office	Retail	Warehouse	Industrial	Hotel/ Motel	Wine	Special Fee	Exempt
Medical/dental offices and clinics.	X							
Industrial/ Wholesale Uses; self-storage uses.			X					
Wholesale and warehouse uses.			X					
General industrial uses.				X				
Research, development and testing uses.				X				
D. Industrial Uses Public and private elementary schools (grades K-8)								X
Public and private secondary schools								X
Public and private college/university								X
Technical and adult education (business, beauty, barber, trade, technical, vocational and other similar uses).		X						

Non-Residential Use	Office	Retail	Warehouse	Industrial	Hotel/ Motel	Wine	Special Fee	Exempt
Hospitals							X	
Nursery Schools and daycare facility serving even or more children		X						
Public libraries, art galleries, museums and other non-recreational public facilities.								X
E. Assembly Uses Churches.								X
Funeral homes.		X						
Auditoriums.							X	
Theaters.		X						
Sports Arenas.							X	
F. Wine Uses Wine production.						X		
Wine storage.			X					
Wine tank and crush pads.			X					
Wine visitor centers.						X		

Non-Residential Use	Office	Retail	Warehouse	Industrial	Hotel/ Motel	Wine	Special Fee	Exempt
G. Unlisted Uses							X	
H. Exempt or Special Fee Users Agricultural uses.								X
Child care center with six or fewer children.								X
Christmas tree sales lot.								X
Fuel yard.							X	
Golf course.							X	
Marinas.							X	
Nonprofit organization–food preparation for off-site consumption.								X
Nonprofit organization–food storage and distribution.								X
Nonprofit organization–meal service facility.								X
Public parking lot.								X
Public utility yard.								X

Non-Residential Use	Office	Retail	Warehouse	Industrial	Hotel/ Motel	Wine	Special Fee	Exempt
Railroad yard or shop.							X	
Residential care facility–nonprofit.							X	
Residential care facility–private.							X	
Schools–nonprofit.								X
Wholesale stores and distribution.							X	

D. Alternative to Payment of Housing Impact Fee.

As an alternative to payment of the Housing Impact Fee, a developer of a nonresidential development project may submit a request to mitigate the impacts of such development through the construction of residential units, the dedication of land, or mixed use or other resources. Such requests shall be approved by the city council, if the city council determines that such alternative will further affordable housing opportunities in the city to an equal or greater extent than payment of the Housing Impact Fee.

E. Processing Requirements.

1. Each discretionary permit for a project subject to this section shall contain an express condition requiring compliance with this section.

2. No application for building permits or discretionary permits for any project subject to this section shall be deemed

complete unless the application contains (a) a statement of the number of gross square feet in a non-residential development project to be constructed, added, or placed that are subject to the requirements of this section, together with documentation sufficient to support the application; (b) the intended use or uses for the non-residential development project by gross square feet; and (c) a statement of any exemptions applicable to the project.

3. The housing director may require similar information for completeness of other city permits or licenses as necessary or convenient to implement this section.

F. Phase-in Requirements.

Notwithstanding any other provision of this section, any Housing Impact Fee imposed pursuant to this section in connection with a building permit issued for a project approved by use permit or similar discretionary approval between January 6, 1999, and January 5, 2000, shall be reduced by 50% of the amount set by city council resolution and payment of this reduced fee shall constitute full compliance.

15.94.050 Residential development project: Inclusionary/in-lieu fee requirements.

A. Inclusionary requirement.

At least 10% of all new dwelling units in a residential development project shall be affordable units which shall be constructed and completed not later than the related market rate units. For fractions of affordable units, including fractions resulting from construction of less than ten dwelling units, the developer may elect, at his or her option, to construct the next higher whole number of affordable units, perform an equivalency action alternative which has received the approval of council pursuant to subsection B hereof, or pay the In-lieu fee specified in subsection D for such fraction. Notwithstanding

the above, this section shall not apply to projects which fall into one or more of the following categories:

1. The construction of a single dwelling unit which is the whole of a residential development project and which is built, owned, and after completion, occupied for two years by a moderate income household verified by the housing director and meets the requirements established by subsection M. For purposes of this exemption, a dwelling unit shall be deemed "built" by its owner if it is built by or for a permit holder who intends to reside in the dwelling unit subject to subsection M hereof; or

2. Projects that are the subject of development agreements currently in effect with the city and approved prior to the effective date of this chapter where such agreements expressly preclude the city from requiring compliance with this type of a housing fee program; or

3. The building permit application for a project for which a use permit and any extensions thereof, was approved prior to January 5, 1999; or

4. A residential development project to the extent it has received a vested right to proceed without payment of housing impact fees pursuant to state law.

5. Building permits for residential development projects if compliance with this section for such project has already been satisfied including, but not limited to, building permits on newly created lots where the subdivider has built affordable units or otherwise satisfied this section.

6. Any dwelling unit which is damaged or destroyed by fire or natural catastrophes so long as the square footage and use of the building remains the same.

7. A building permit application for the first dwelling unit to be constructed on a lot which was legally created prior

to January 5, 1999, or created by the recordation of a final or parcel map which conforms to a previously approved tentative subdivision or parcel map so long as such tentative map and any extensions were approved by the city prior to January 5, 1999.

B. Alternative Equivalent Proposal.

A developer of a single-family residential development project may meet the requirements of subsection A hereof by an alternative equivalent action. A developer of a multi-family residential development project may propose to meet the requirements of subsection A hereof by an alternative equivalent action, subject to the review and approval by the city council. A proposal for an alternative equivalent action may include, but is not limited to, dedication of vacant land, the construction of affordable units on another site or acquisition and enforcement of required rental/sales price restrictions on existing standard dwelling units consistent with this section. Any proposal shall show how the alternative proposed will further affordable housing opportunities in the City to an equal or greater extent than compliance with the express requirements of subsection A or compliance with the express requirements of subsection A or payment of the appropriate in-lieu housing fee. Such proposals for single-family residential developments shall be approved by the city council, if the council determines that such alternative will further affordable housing opportunities in the city to an equal or greater extent than payment of the housing in-lieu fee. Such proposals for multi-family residential developments shall be considered on a case by case basis by the city council and may be approved at the city council's sole discretion, if the city council determines that such alternative will further affordable housing opportunities in the city to an equal or greater extent than compliance with the express requirements of subsection A.

C. In-lieu Housing Fee.

A developer of single family residential development project may meet the requirements of subsection A hereof by payment of an in-lieu fee. A developer of a multi-family residential development may propose to meet the requirements of subsection A hereof by submitting at the time of application for a discretionary or building permit, whichever comes first, a request to pay the in-lieu fee along with a report identifying all overriding conditions impacting the project that prevent developer from meeting the requirement to construct the affordable units; sufficient independent data, including appropriate financial information, that supports the developer's claim that it is not feasible to construct the required affordable units and a detailed analysis of why the various concessions and incentives identified in subsection F cannot mitigate the developer's identified conditions that are preventing him/her from constructing the affordable units. The planning director and the housing director shall review all such requests and prepare a recommendation for the council. Such requests shall be considered on a case-by-case basis by the council and may be approved, at the council's sole discretion, if the council determines that there are overriding conditions impacting the project that prevent developer of a multi-family residential development from meeting the requirement to construct affordable units and that payment of the in-lieu fee will further affordable housing opportunities.

D. Time of Payment of In-lieu Fee.

Unless otherwise preempted by law, the housing in-lieu fee shall be paid prior to the issuance of a building permit, or upon execution by the developer and owner, if different, of the city's secured building agreement recorded against the property, at the time of final inspection/Certificate of Occupancy. The housing director is hereby authorized to execute such agreements on behalf of the city.

E. Calculation of Housing In-lieu Fee.

The housing in-lieu fee shall be charged on a percentage basis of the projected construction costs of market rate dwelling units. The amounts and calculation of the housing in-lieu fee shall be established by resolution of the city council. Construction costs of market rate dwelling units is determined in accordance with the definition in Section 15.94.020 which states "Construction costs shall mean the estimated cost per foot of construction, as established by the building department of the City of Napa for use in the setting of regulatory fees and building permits, multiplied by the total square footage to be constructed for each dwelling unit, minus square footage for garage area." For attached single-family residential and rental residential development projects, construction costs shall be separately calculated for each dwelling unit and the appropriate fee paid for each unit within the residential project. The housing in-lieu fee required by this section may be satisfied either by cash payment or upon the recommendation of the housing director and approval of the city council, by an alternative which will provide city with a value equal to or greater than the amount of the required in-lieu fee.

F. Affordable Housing Concessions or Incentives.

1. For residential development projects which meet the requirements specified in subsection A through the actual construction of affordable units, the city shall follow the procedures described below and provide the described concessions and/or those incentives identified in Chapter 17.84 of the Napa Municipal Code:

a. Within ninety (90) days of submittal by a developer of a written preliminary conceptual development proposal prior to the submittal of any formal application for a general plan amendment, rezoning, use permit, tentative subdivision or parcel map or other permit or entitlement describing and specifying the number, type, location and size of the housing

development, identifying any requests for density bonus, additional incentives, concessions or waivers or modification of development or zoning standards, necessary to make construction feasible for the proposed development, including the affordable units, the city council shall review the preliminary development proposal at a public hearing noticed in accordance with Napa Municipal Code Section 17.06.070(C.) and indicate conceptual approval or disapproval of the proposed development and any requests for additional affordable housing incentives, concessions or waivers or modification of development or zoning standards. Such preliminary approval or disapproval shall not bind the city council but rather shall be subject to the discretion of the city council to modify its preliminary recommendations based upon a full review of all pertinent project information, including any environmental impact report, presented at the public hearing on the application.

b. Applications which include the construction of affordable units shall be processed by all city departments before other residential land use applications regardless of the original submittal date. Applications including affordable rental units shall be processed before applications including owner-occupied units.

c. All city-required fees on affordable units shall be deferred for payment until the issuance of the certificate of occupancy.

d. For owner-occupied affordable units, the city through the Housing Authority of the City of Napa shall purchase and assume responsibility for marketing and selling an affordable unit that remains unsold upon the issuance of a certificate of occupancy using trust fund or other available funds. Until the issuance of a certificate of occupancy, the developer is responsible for marketing and selling the affordable units.

2. The city council may consider, on a case-by-case-basis, at its sole discretion the provision of the following additional concessions or incentives identified in Government Code Section 65915 which are consistent with state law and the Housing Element of the City of Napa General Plan for projects which meet or exceed the requirements of Chapter 17.84:

a. An additional density bonus or other incentives of equal financial value subject to the city council's review and approval.

b. Waiver or modification of city standards that have a direct impact on reducing total project costs while being consistent with required Building and Safety Code standards. The developer shall be responsible for documenting that the waiver or modification is necessary for the feasibility of the residential development project and is consistent with required Building and Safety Code Standards.

c. Provision of direct financial assistance in the form of a loan or grant using trust fund or other appropriate available funds subject to the recommendation of the housing director.

d. Deferral of payment of city fees on market rate units until the issuance of the certificate of occupancy for the unit.

3. The city council may consider, on a case by case basis, at its sole discretion, the provision of additional concessions or incentives consistent with state law and the Housing Element of the City of Napa General Plan for residential development projects which provide at least 15% of the total dwelling units as affordable units.

G. Requirements for Rental Affordable Units.

1. One-half of the affordable units which are required to be constructed in connection with construction of rental market rate units shall be available at affordable rents to very low-income households. The remaining one-half of the required

affordable units shall be available at affordable rents to low-income households. Where the number of required affordable units is an odd number, the number of affordable units constructed for very low-income households may be one less than the number of affordable units construction for low-income households.

2. With respect to any particular rental residential project, the city council may, upon the recommendation of the housing director, forgive all or a portion of the affordability requirement set forth in subsection A above upon a showing by the applicant that imposition of such requirement on the residential project will cause undue hardship and that such residential project will contribute significantly to affordable housing opportunities in the city.

H. Requirements for Owner-occupied Affordable Units.

1. One-half of the affordable units which are required to be constructed in connection with the construction of market rate units intended for owner-occupancy shall be available at affordable sales prices to households whose annual household income does not exceed 100% of median income. If one-half of the affordable units required at an affordable sales price not exceeding one hundred percent (100%) of median income are available at affordable sales prices to households whose annual household income does not exceed eighty percent (80%) of median income, the developer shall be entitled to an additional density bonus of five percent (5%) for the proposed development.

2. As an alternative to receiving an additional density bonus of five percent (5%), a developer may submit a request for another incentive of a financial value equal to the density bonus. Such requests shall be considered on a case-by-case

basis by the city council and shall be approved, at the city council's sole discretion, if the city council determines that such alternative incentive will further affordable housing opportunities.

3. The remaining one-half of the required affordable units shall be available at affordable sales prices to moderate income households. Where the number of required affordable units is an odd number, the number of units affordable to moderate income households may be one greater than the number affordable at or below 100% of median income.

I. Basic Requirements for Owner-Occupied and Rental Affordable Units.

Affordable units shall be comparable in number of bedrooms, exterior appearance and overall quality of construction to market rate units in the same residential project. Subject to the approval of the planning director and housing director, square footage of affordable units and interior features in affordable units may not be the same as or equivalent to those in market rate units in the same residential project, so long as they are of good quality and are consistent with contemporary standards for new housing. Affordable units shall be dispersed throughout the residential project, or, subject to the approval of the planning director and housing director, may be clustered within the residential project when this furthers affordable housing opportunities.

J. Continued Affordability.

1. Prior to the issuance of certificates of occupancy or approval of the final inspection for affordable units, regulatory agreements and, if the affordable units are owner-occupied, resale restrictions, deeds of trust and/or other documents, all of which must be acceptable to the housing director and consistent with the requirements of this chapter, shall be recorded against parcels having such affordable units and shall be effective for

a minimum of 30 years with respect to each owner-occupied affordable unit and in perpetuity for rental affordable units.

2. Notwithstanding any other provision in this Section: (a) The maximum sales price permitted on resale of an affordable unit intended for owner-occupancy shall not exceed the seller's purchase price, adjusted for the percentage increase in median income since the seller's purchase, plus the value of substantial structural or permanent fixed improvements to the property, plus the cost of reasonable seller's broker fee as determined by the housing director. For purposes of this subparagraph, median income shall be calculated based upon the presumed occupancy levels used to determine affordable sales price. (b) the resale restrictions shall provide that in the event of the sale of an affordable unit intended for owner-occupancy, the city shall have the right to purchase or assign its right to purchase such affordable unit at the maximum price which could be charged to an eligible household.

3. No household shall be permitted to occupy an affordable Unit, or purchase an affordable unit for owner-occupancy, unless the city or its designee has approved the household's eligibility, or has failed to make a determination of eligibility within the time or other limits provided by a regulatory agreement or resale restrictions, if the city or its designee maintains a list of eligible households, households selected to occupy affordable units shall be selected first from that list to the extent provided in the regulatory agreement or resale restrictions.

K. Annual Monitoring and Transfer Fees.

1. For each rental affordable unit provided hereunder, the current owner may be required to pay an annual monitoring fee for the term of required affordability. Such fee shall be specified in the regulatory agreement(s) required hereunder.

2. For each owner-occupied affordable unit provided under this section, the current owner may be required to pay a transfer fee for any change of ownership during the term of required affordability. Such fee shall be specified in the resale restrictions required by subsection J.

L. Discretionary Permit Requirements.

Every discretionary permit for a residential development project approved after the effective date of this chapter shall contain a condition detailing the method of compliance with this chapter. Every final and parcel map shall bear a note indicating whether compliance with the requirements of this section must be met prior to issuance of a building permit for each lot created by such map.

M. Requirements for Certificate of Occupancy/Final Inspection.

1. No temporary or permanent certificate of occupancy shall be issued, final inspection approved or release of utilities authorized for any new dwelling unit in a residential development project until the developer has satisfactorily completed the requirements hereunder, i.e., on-site construction of affordable units, alternative equivalent action(s) or payment of the housing in-lieu fee.

2. No temporary or permanent certificate of occupancy shall be issued, final inspection approved or release of utilities authorized for a dwelling unit described in subsection A(1) above until the developer has made a showing acceptable to the housing director that such an exemption is appropriate. The housing director shall develop and implement regulations designed to ensure that such initially exempt dwelling units remain in compliance with the terms of the exemption throughout the first two years of occupancy. A developer of a dwelling unit found to be out of compliance at any time during

such two-year period shall be required to pay 125% of the then current in-lieu fee for that dwelling unit, as specified by resolution of the city council. Such payment, however, shall not limit the city's ability to proceed against any party pursuant to Section 15.94.060 or other applicable law.

N. Phase-in Requirements.

Notwithstanding any other provision of this section, any housing in-lieu fee or inclusionary requirement imposed pursuant to this section in connection with a building permit or license issued for a project approved between January 6, 1999, and January 5, 2000, shall be reduced by 50% of the amount set by city council resolution, and payment of this reduced fee or meeting 50% of the inclusionary requirement of subsection A shall constitute full compliance.

15.94.060 Enforcement provisions.

A. It shall be unlawful, a public nuisance and a misdemeanor for any person to sell or rent an affordable unit at a price or rent exceeding the maximum allowed under this chapter or to a household not qualified under this chapter, and such person shall be subject to a $500.00 fine per month from the date of original non-compliance until the affordable unit is in compliance with this section.

B. The Napa City Attorney's Office or the Napa County District Attorney, as appropriate, shall be authorized to abate violations of this chapter and to enforce the provisions of this chapter and all implementing regulatory agreements and resale controls placed on affordable units by civil action, injunctive relief, and any other proceeding or method permitted by law.

C. The remedies provided for herein shall be commulative and not exclusive and shall not preclude the city from any other remedy or relief to which it otherwise would be entitled under law or equity.

15.94.070 Annual review.

The Housing Impact Fee, Housing In-lieu Fee and inclusionary requirements authorized by this chapter and implementing resolution(s) shall be reviewed annually by the city council.

15.94.080 Adjustment.

A. A developer of any project subject to the requirements in this chapter may appeal to the city council for a reduction, adjustment, or waiver of the requirements based upon the absence of any reasonable relationship or nexus between the impact of the development and either the amount of the fee charged or the inclusionary requirement.

B. A developer subject to the requirements of this chapter who has received an approved tentative subdivision or parcel map, use permit or similar discretionary approval and who submits a new or revised tentative subdivision or parcel map, use permit or similar discretionary approval for the same property may appeal for a reduction, adjustment or waiver of the requirements with respect to the number of lots or square footage of construction previously approved.

C. Any such appeal shall be made in writing and filed with the city clerk not later than ten (10) days before the first public hearing on any discretionary approval or permit for the development, or if no such discretionary approval or permit is required, or if the action complained of occurs after the first public hearing on such permit or approval, then the appeal shall be filed within ten (10) days after payment of the fees objected to. The appeal shall set forth in detail the factual and legal basis for the claim of waiver, reduction, or adjustment. The city council shall consider the appeal at the public hearing on the permit application or at a separate hearing within sixty (60) days after the filing of the appeal, whichever is later. The appellant shall bear the burden of presenting substantial

evidence to support the appeal including comparable technical information to support appellant's position. No waiver shall be approved by the city council for a new tentative subdivision or parcel map, user permit or similar discretionary approval on property with an approved tentative subdivision or parcel map, use permit or similar discretionary permit unless the council finds that the new tentative subdivision or parcel map, user permit or similar discretionary approval is superior to the approved project both in its design and its mitigation of environmental impacts. The decision of the council shall be final. If a reduction, adjustment, or waiver is granted, any change in use within the project shall invalidate the waiver, adjustment, or reduction of the fee or inclusionary requirement

Section 4. This Ordinance shall expire on January 5, 2009, unless a later enacted Ordinance enacted before January 5, 2009 deletes or extends this date.

Section 5. The City Council finds that there are now several proposed residential and non-residential development projects in various stages before the City. The Council finds that the funds from a Housing Impact Fee, Housing In-lieu Fee, and inclusionary requirements are necessary to mitigate the immediate additional demand for more affordable housing created by these development projects and to assure implementation of the City's General Plan and Housing Element. Without the proposed fees and inclusionary requirements, the City would not be able to retain a balanced community with housing opportunities available to low and moderate income households in the City. The City Council hereby determines that such demand for additional affordable housing caused by proposed new development projects requires that this ordinance become effective immediately.

Section 6. This urgency ordinance shall take effect immediately upon the date of its adoption, and prior to the expiration of fifteen (15) days from the passage thereof shall be published

at least once in the Napa Valley Register, a newspaper of general circulation, published and circulated in the City of Napa and thenceforth and thereafter the same shall be in full force and effect.

Section 7. Because of the urgency of this ordinance, to the extent any other substantive or procedural requirements may otherwise apply or be imposed pursuant to the Napa Municipal Code or any other ordinance or resolution, including but not limited to notice requirements and requirements of the Planning Commission review and interim ordinance requirements under Napa Municipal Code Section 17.08.080, such requirements are hereby waived and deemed inapplicable to the adoption of this urgency ordinance.

Section 8. If any section, sub-section, subdivision, paragraph, clause or phrase in this ordinance or any part thereof, is for any reason held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining sections or portions of this ordinance or any part thereof. The City Council hereby declares that it would have passed each section, sub-section, subdivision, paragraph, sentence, clause or phrase of this ordinance, irrespective of the fact that any one or more sections, sub-sections, subdivisions, paragraphs, sentences, clauses or phrases may be declared invalid or unconstitutional.

MAYOR

/s/ Ed Henderson

ATTEST:

/s/ Pamyla Nigliazzo
City Clerk

STATE OF CALIFORNIA)
COUNTY OF NAPA) SS:
CITY OF NAPA)

I, Pamyla Nigliazzo, City Clerk of the City of Napa, do hereby certify that the foregoing urgency ordinance was adopted on July 6, 1999, by the following vote:

AYES: Sercu, Techel, Busenbark, Martin and Henderson

NOES: None

ABSENT: None

ATTEST: /s/ Pamyla Nigliazzo
City Clerk
of the City of Napa

Appendix G–1

ORDINANCE O1999/20

AN ORDINANCE OF THE CITY OF NAPA, COUNTY OF NAPA, STATE OF CALIFORNIA, ADDING CHAPTER 15.94 TO THE NAPA MUNICIPAL CODE CREATING AND ESTABLISHING A HOUSING TRUST FUND, A HOUSING IMPACT FEE ON NON-RESIDENTIAL DEVELOPMENT AND ESTABLISHING AN INCLUSIONARY IN-LIEU FEE REQUIREMENT FOR RESIDENTIAL DEVELOPMENT PROJECTS

Be it ordained by the City Council of the City of Napa as follows:

Section 1. With respect to non-residential development, the Council finds as follows:

A. New office, retail, industrial, hotel, warehouse, wine production and other non-residential uses (hereinafter referred to as "non-residential uses" or "non-residential development projects") in the City of Napa ("City") have been, and continue to be, a major factor in attracting new employees to the region. A number of these employees and their families reside, or will reside, in the City of Napa. These new employees and their families create a need for additional housing in the City of Napa.

B. Traditionally these non-residential uses have benefited from a supply of housing for their employees available at competitive prices and locations close to the place of employment. However, in recent years, the supply of housing has not kept pace with the demand for housing created by these new employees and their families. If this shortage were to grow or continue, employers would have increasing difficulty in

locating in or near the City of Napa due to problems associated with attracting a labor force. Employees would be unable to find appropriate housing in the area, and accordingly would be forced to commute long distances. This situation would adversely affect their quality of life, consume limited energy resources, increase congestion on already overcrowded highways and have a negative impact on air quality.

C. The competition for housing is especially acute with respect to households of low income (those households with incomes of 80% or below median income for Napa County). An identifiable portion of the new employees attracted to the City of Napa by new non-residential development will live in low and very low income households and will therefore compete with present residents for scarce affordable housing units in the City. Increasing the production and availability of low income housing is especially problematic. Prices and rents for housing affordable to households of low and very row income remain below the level needed to attract new construction. This is even more true for households of very low income (those with incomes 50% or below median income for Napa County). Federal and State housing finance and subsidy programs are not sufficient by themselves to satisfy the low-income housing requirements associated with this employment.

D. On November 17, 1992, the Council adopted the Housing Element of the City of Napa General Plan. The Housing Element calls for the provision of additional housing for all sectors of the population, to accommodate the demands of both existing and new residents attracted to the region by increased employment. The Housing Element also provides that the City should make special efforts to encourage an increased supply of housing affordable to low and very low income households. More specifically, the City of Napa within its Housing Element, committed itself to the establishment of a City Inclusionary Housing Program and an Industry-Housing Linkage Program as key elements of its plan to help ensure that

housing will be available for all economic segments, as required by State law.

E. The City, with assistance from the NCCDC Affordable Housing Task Force and the Jobs-Housing Nexus Study Advisory Committee, studied housing needs throughout all jurisdictions, and the financial mechanisms available to address those needs, in Napa County. The resultant City of Napa and Napa County Jobs-Housing Nex s Study, September 1992, updated as of February 16, 1999 ("Nexus Report"), which is hereby incorporated by reference, examined the connection between non-residential development projects and the housing needs of moderate, low and very low income households. The Nexus Report concluded that a clear nexus can be established between the employees of various commercial and industrial buildings or land use types and the number of moderate, low and very low income employee households that are directly associated with such buildings and that will accordingly impact the housing market in and around Napa City: The Nexus Report further quantified the share of this need represented by low and very low income households.

F. Non-residential development brings in new employees, a significant percentage of those employees will live in the City, and that this number yields a certain number of households from which a definable number will be of low or very low income. Adjustments may be made to this number of households to take into account household size, multiple earner households, previously housed employees, etc., to yield the approximate per square foot contribution each employment activity contributes to the net new need for a housing subsidy, Based on the Nexus Report, each additional square foot of office development creates a need for low-income housing assistance in an amount of $17.65; retail development creates a need of $17.10 per square foot; industrial development creates a need of $6.52 per square foot; hotel development creates a need of $10.23 per square foot; warehouse development creates

a need of $2.49 per square foot; and the development of wine production facilities creates a need of $6.52 per square foot.

G. The City housing fee is established to implement the goals and objectives of the City of Napa General Plan, including the Housing Element and related environmental documents, the Napa City General Plan Environmental Impact Report, the NCCDC Affordable Housing Finance Task Force report and recommendations and the Nexus Report, together with the reports appended thereto or referenced therein quantifying the nexus between development and low-income housing need. Further to mitigate the impacts caused by new non-residential development in the city of Napa that is appropriate to impose some of the cost of the increased burden of providing housing for low and very low income households necessitated by such non-residential development directly upon the sponsors of the development. The imposition of a housing impact fee is an appropriate means to accomplish this purpose. However, the Council recognizes that establishing a fee at the upper range of the identified burden could have a negative effect on the City's ability to compete in the regional market for non-residential development projects. Thus, in calculating the amount of the housing impact fee, the Council has carefully weighed other factors in addition to the simple calculation of contribution. These include impact of the fee on construction costs, the need to foster the City's competitive position, special factors and hardships associated with certain types of development, and legal issues. Any increases in such fees in the future should consider these same criteria. In view of the numerous assumptions which must attend any such studies and conclusions, the Council has determined that the fee requirements will be set well below the calculated cost of providing market rate low-income housing to persons attracted to the City by corresponding employment opportunities. Further, in order to reduce the initial impact of these fees on the development

community, the Council has determined to phase the fee program in over time.

H. Most non-residential land uses in the City clearly fall within one of the six basic use types studied in the Nexus Report, and are charged a fee accordingly in this ordinance. In a limited number of situations, the fee must be based on a project-by-project determination due to insufficient information as to the general characteristics as to that type of use or special attributes which make building size an inappropriate indicator of employee density.

I. It is recognized that it is inappropriate to impose this housing fee requirement on certain types of non-residential uses because the fee would violate previous development agreements or other quasi-contractual agreements, or is preempted by state law; or because special characteristics of the use otherwise mitigate the impacts or are in themselves mitigation measures to assist the same low-income population to which this ordinance is addressed or because it can be determined that the use categorically will have few or no employees, thus negating the required nexus.

J. One of the purposes of this ordinance is to establish a feasible means by which developers of non-residential development projects assist in increasing the supply of low and very low income housing. The housing fee requirements contained in this ordinance are designed to create a rational relationship between the amount of housing need created by the employment use and the size of the fee, taking into account the impact of such fee on housing construction costs and economic feasibility.

K. The need to provide safe and sanitary dwelling accommodations to persons of low and moderate income is a matter of Citywide concern and represents a responsibility that should be borne by all sectors of the community. The enactment of a housing fee for non-residential development

only partially addresses the total impacts caused by non-residential developments and is intended as one part of the City's multi- faceted approach to affordable housing problems. Further regulatory changes to encourage the production of low-income housing will also be considered to address the existing and future need.

Section 2. With respect to residential development, the City Council finds and declares as follows:

A. Rental and owner-occupied housing in the City has become more and more expensive over time. Housing costs have gone up faster than incomes for many groups in the community.

B. Many persons who cannot afford housing in the City of Napa work in the City, have grown up or have family ties in the City, already live and work in the City but must move because housing is no longer affordable, or wish to live in the City for other reasons.

C. Federal and State government programs do not provide nearly enough affordable housing or subsidies to satisfy the housing needs of low or moderate income households who want or need housing in the City. Newly constructed housing is available in the City, with rare exceptions, only at prices which low and moderate income households cannot afford to pay. This problem has been exacerbated in the past by the fact that local government has at times failed to take a sufficiently active role in the affordable housing effort.

D. Rising land prices have been a key factor in preventing development of new affordable housing. New market rate housing construction in the City aggravates the existing shortage of affordable housing by absorbing the supply of available residential land. This not only reduces the supply of land for affordable housing but further increases the price of remaining residential land. At the same time, new housing

contributes to the demand for goods and services in the City, increasing local employment at wage levels which often do not permit employees to afford housing in the City.

E. Rising land prices and the resultant lack of affordability of housing for local residents and people working in the City are further exacerbated by the high demand for second homes, luxury homes and housing for new residents who commute to the greater Bay Area to work. The use of limited residential land for these purposes further increases the price of remaining residential land.

F. The desirability of the City as a place for second homes, luxury homes and as a bedroom community for workers in the greater Bay Area labor market results from strong agricultural protection and open space policies resulting in a desirable living environment which in turn makes housing affordability for local residents who work in local industries even more difficult to achieve. The City's General Plan contains policy statements favoring the protection of agriculture and open space in the County and directing housing and other urban uses to the urban areas, through the use of a Rural Urban Limit Line (RUL) to denote limits on urban development. These factors and an observed pattern of substantial remodels and demolition/replacement in agricultural areas are probably related; remodeled and replacement dwellings often eliminate older residential units that can economically provide more affordable housing. High percentages of newly constructed or remodeled homes in the upper end of the housing market further exacerbate the affordable housing problem by creating greater needs for many services typically provided by low-income employees.

G. Because neither the private market nor the public sector has as yet provided the levels of housing affordability necessary for the maintenance of a balanced community, local government must take an active lead to insure an adequate

supply of housing for residents and working people of all income levels.

H. The citizens of the City wish to retain a balanced community, with housing available to low and moderate income households. The City agrees with the established policy of the State of California that each community should make available an adequate supply of housing to persons at all economic levels. The City's use of its police power to regulate housing production in ways designed to achieve such a mix of units in the community is appropriate. As stated above, the Council has adopted the Housing Element of the City of Napa General Plan which supports the provision of additional housing for all sectors of the population, with an emphasis on the increased supply of housing affordable to low and very low income households, and calls for the establishment of an Inclusionary Housing program.

I. A balanced community is only possible if part of the new housing built in the City of Napa is affordable to low and moderate income households. Amending the land use regulations of the City to require builders of new housing to include some housing affordable to low or moderate income households, or to otherwise contribute to the effort to increase the supply of affordable housing in the City, is fair, not only because new development contributes to the shortage of affordable housing, but also because the land use regulations of the City in regard to new housing in the City should be consistent with the community's goal of providing an adequate supply of housing for residents and working people of all income levels. Further in order to mitigate the impacts caused by new residential development in the City of Napa, it is appropriate to impose some of the cost of the increased burden of providing housing for low and very low income household directly upon the sponsors of the development contributing to the shortage of affordable housing.

J. The Council shall encourage the building and availability of affordable housing in the City by providing incentives and reducing the constraints on such development in the community. In this regard, the Council intends to consider such things as the establishment of public/private partnerships and the provision of incentives to the building community as provided by law and in the Housing Element of the City of Napa General Plan.

K. Maintaining the affordability of units constructed under this ordinance best serves the goal of assuring a continuing supply of affordable housing for local residents and people who work in the City of Napa but cannot afford to live here. If affordable units are not restricted so as to continue to be affordable at the time of resale, then such units will become market rate units within a relatively short period of time and, with the limited supply of residential land combined with increasing local land and building costs, the units will not be replaceable.

L. The requirements of this ordinance are minimum requirements. The City reserves the right to require additional measures to further affordable housing to the extent it has authority to do so without respect to this ordinance. As mentioned above, the efforts contained in this ordinance are simply one aspect of the City's developing strategy to address affordable housing needs on a variety of fronts.

M. Pursuant to Government Code Section 65913.2, the City Council has considered the effects of these actions on the City's housing needs as established in the Housing Element of the General Plan.

Section 3. Chapter 15.94 is hereby added to the Napa Municipal Code to read as follows:

Appendix G–10

Chapter 15.94

CITY OF NAPA HOUSING TRUST FUND, HOUSING IMPACT FEE AND INCLUSIONARY/IN LIEU FEE REQUIREMENTS

Sections:

15.94.010 Purpose
15.94.020 Definitions
15.94.030 Housing Trust Fund
15.94.040 Non-residential Development Project Housing Impact Fee
15.94.050 Residential Development Inclusionary/ In-lieu Fee requirements
15.94.060 Enforcement provisions
15.94.070 Annual review
15.94.080 Adjustment

15.94.010 Purpose.

The purpose of this chapter is to establish a Housing Trust Fund, a Housing Impact Fee on developers of non-residential development projects in the City of Napa, and an inclusionary requirement or an in-lieu fee on developers of residential development projects to mitigate the impacts caused by these development projects on the additional demand for more affordable housing and rising land prices for limited supply of available residential land. The fees will be used to defray the costs of providing affordable housing for very low, low, and moderate income households in the City of Napa. The fees and inclusionary requirements required by this chapter do not replace other regulatory, development and processing fees or exactions, funding required pursuant to a development agreement or reimbursement agreement; assessments charged

pursuant to special assessments or benefit assessment district proceedings, etc., unless so specified.

15.94.020 Definitions

As used in this chapter:

A. "Addition" shall mean an extension or increase in floor area of existing development project.

B. "Affordable rent" shall mean monthly rent, including tenant paid utilities allowances as determined by the Housing Director and all fees for housing services, that do not exceed thirty percent (30%) of eighty percent (80%) of area median income for lower income households. For very low- income households affordable rents are monthly rents that do not exceed thirty percent (30%) of fifty percent (50%) of area median income. In the case where the applicant is requesting a density bonus under chapter 17.84 of the Napa Municipal Code or where the applicant is requesting direct financial assistance requiring a different rent, "affordable rent" for lower income households, shall mean monthly rents that do not exceed thirty percent (30%) of sixty percent (60%) of area median income. Affordable rent shall be based on presumed occupancy levels of one person in a studio unit, two persons in a one bedroom unit, three persons in a two bedroom unit, and one additional person for each additional bedroom thereafter.

C. "Affordable sales price" shall mean the maximum purchase price that will be affordable to the specified target income household. A maximum purchase price shall be considered affordable only if each monthly owner-occupied housing payment is equal to or less than one-twelfth of 30% of income for the specified target income household. In setting the affordable sales price, realistic assumptions regarding down payment, mortgage interest rate and term will be so that targeted income families can reasonably qualify. Affordable sales price shall be based upon presumed occupancy levels of

one person in a studio unit, two persons in a one bedroom unit, three persons in a two bedroom unit, and one additional person for each additional bedroom thereafter.

D. "Affordable units" shall mean and be limited to those dwelling units which are required to be rented at affordable rents or purchased at an affordable sales price to specified households as described in Section 15.94.050.

E. "Annual household income" shall mean the combined gross income for all adult persons living in a dwelling unit as calculated for the purpose of the Section 8 program under the United States Housing Act of 1937, as amended, or its successor.

F. "Building permit" shall mean a permit issued pursuant to Chapter 15.08 of Title 15 of the Napa Municipal Code.

G. "Chief building official" shall mean the chief building official of the City of Napa, or the designee of such individual.

H. "City" shall mean the incorporated areas of the City of Napa.

I. "Concession" or "incentive" shall have the same meaning as set forth in Chapter 17.04 of the City of Napa Municipal Code.

J. "Construction costs" shall mean the estimated cost per square foot of construction, as established by the building department of the City of Napa for use in the setting of regulatory fees and building permits, multiplied by the total square footage, minus the garage floor area, to be constructed.

K. "Developer" shall mean every person, firm, or corporation constructing, placing, or creating new non-residential or residential development directly or through

the services of any employee, agent, independent contractor or otherwise.

L. "Discretionary permit" shall mean any permit or license issued by the City of Napa for a project which requires the exercise of judgment or deliberation wherein the City decides to either approve or disapprove a particular activity in accordance with applicable laws, including but not limited to use permits, and the approval or modification of tentative, or tentative parcel maps pursuant to Title 16 of the Napa Municipal Code.

M. "Dwelling unit" shall have the meaning set forth in Chapter 17.04 of the City of Napa Municipal Code.

N. "Gross square feet floor area" means the sum of the gross horizontal floor areas of a building measured from the exterior face of exterior walls, or from the center line of a wall separating two buildings. In cases where no walls exist, the gross horizontal floor area shall be that area covered by the roof excluding two feet on each side of the structure for a standard roof projection. Outside areas used for sales and/or display may also be considered (e.g., plant nurseries, building materials, auto sales, wine production, etc.) when the planning director determines that the use of the outside area significantly contributes to the employee density of the building. For purposes of the requirements of Section 15.94.050, the square footage of any tank or wine crush pad or similar non-walled wine related structure shall be included in the gross square feet of a non-residential development project.

O. "Housing Board" shall mean the Housing Trust Fund Board established pursuant to Section 15.94.030.

P. "Housing director" shall mean the housing director of the Housing Authority of the City of Napa or the designee of such individual.

Q. "Housing Fund" shall mean the City of Napa Affordable Housing Trust Fund established pursuant to Section 15.94.030.

R. "Housing Impact Fee" shall mean the fee established pursuant to Section 15.94.040 for non-residential development projects.

S. "Housing In-lieu Fee" shall mean the fee established pursuant to Section 15.94.050 for residential development projects.

T. "Low-income households" are those households with incomes of up to 80% of median income.

U. "Market rate units" shall mean dwelling units in a residential project which are not affordable units.

V. "Median income" shall mean the median income, adjusted for family size, applicable to Napa County as published annually pursuant to Title 25 of the California Code of Regulations, Section 6932 (or its successor provision) by the United States Department of Housing and Urban Development.

W. "Moderate income households" are those households with incomes of up to 120% of median income.

X. "Monthly owner-occupied housing payment" shall be that sum equal to the principal, interest, property taxes, homeowner's insurance and homeowner's association dues paid on an annual basis divided by 12.

Y. "Non-residential development project" shall mean a project for the construction, addition, or placement of a structure which is for non-residential in such land use categories such as commercial, office industrial, etc. and shall include that portion of a mixed or combined use project which includes the construction, addition or placement of a structure for non-residential use in such land use categories.

Z. "Planning director" shall mean the director of the City of Napa planning department or the designee of such individual.

AA. "Residential development project" shall mean a project for the construction or placement of any dwelling unit in a permanent location, or the subdivision of land which is planned, designed, or used for the following land use categories:

1. Single-family residential: This category consists of single-family detached units and duplexes.

2. Multi-family residential: This category consists of buildings containing three (3) or more dwelling units and mobile home parks.

BB. "Very low-income households" are those households with incomes of up to 50% of median income.

15.94.030 Housing Trust Fund.

A. There is hereby established the City of Napa Affordable Housing Trust Fund (the "Housing Fund"). Separate accounts within such Housing Fund may be created from time to time to avoid commingling as required by law or as deemed appropriate to further the purposes of the Fund.

B. The Housing Fund shall be administered by the Housing Director who shall have the authority to govern the Housing Fund consistent with this chapter, and to prescribe procedures for said purpose subject to approval by the Council.

C. A Housing Trust Fund Board (the "Housing Board") is hereby established. The composition, size, term, decision-making authority and other organizational features of the Housing Board shall be as determined by resolution of the council. To the extent permitted by law and determined by resolutions of the council and Napa County Board of Supervisors, the Housing Board shall be an advisory joint

City/County Housing Board with final funding decisions made by the appropriate legislative body on expenditure of monies from their respective Housing Funds. The Housing Board shall biannually develop a Housing Assistance Plan Program and Financing Strategy, subject to approval by the council, to further define and prioritize the uses of the monies in the Housing Fund. The Plan shall be consistent with the City's Adopted Consolidated Plan.

D. Purposes and Use of Funds.

1. Monies deposited in the Housing Fund along with any interest earnings on such monies shall be used solely to increase and improve the supply of housing affordable to households of moderate, low and very low income households; including, but not limited to acquisition of property and property rights, cost of construction including costs associated with planning, administration, and design, as well as actual building or installation, as well as any other costs associated with the construction or financing of affordable housing; reimbursement to the City for such costs if funds were advanced by the City from other sources; and reimbursement of developers or property owners who have been required or permitted to install facilities which are beyond that which can be attributed to a specific development. To the maximum extent possible, all monies should be used to provide for additional affordable housing and services. Monies may also be used to cover reasonable administrative expenses not reimbursed through processing fees, including reasonable consultant and legal expenses related to the establishment and/or administration of the Housing Fund and reasonable expenses for administering the process of calculating, collecting, and accounting for inclusionary fees and any deferred City fees authorized by this section. No portion of the Housing Fund may be diverted to other purposes by way of loan or otherwise.

2. Monies in the Housing Fund shall be used in accordance with the priorities identified by the Housing Assistance Plan Program and Financing Strategy to construct, acquire, rehabilitate or subsidize very low, low and moderate income housing and/or to assist other governmental entities, private organizations or individuals in the construction, rehabilitation, reimbursement of City advanced funds, reimbursement of developer supplied infrastructure capacity, location or subsidy of very low, low and moderate income housing. To the extent possible as determined by the Council, monies shall be targeted to benefit households at or below 60% of Median Income in Napa County. Monies in the Housing Fund may be disbursed, hypothecated, collateralized or otherwise employed for these purposes from time to time as the housing director and city council determine is appropriate to accomplish the purposes of the Housing Fund. These uses include, but are not limited to, assistance to housing development corporations, equity participation loans, grants, pre-home ownership co-investment, Pre-development loan funds, participation leases, or other public/private partnership arrangements. The Housing Fund monies may be extended for the benefit of rental or owner occupied housing or housing services.

3. Expenditures by the housing director from the Housing Fund shall be controlled, authorized and paid in accordance with general city budgetary policies. Execution of contracts related to the use or administration of Housing Fund monies shall be in accordance with standard council policy.

E. Location of Housing Units and Housing Services to be Assisted With Housing Fund Monies.

1. The Housing Board shall develop, for council approval, criteria for the location of the housing units to be assisted with Housing Fund monies. One of the purposes of these criteria shall be to help ensure that Housing Fund monies are used to assist the city in meeting its fair share housing goals

as set forth in the Housing Element of the City of Napa General Plan.

2. With respect to monies generated by the Housing Impact Fee established by Section 15.94.050, these criteria shall also consider a reasonable geographical linkage between the non-residential development projects subject to such fee and the housing assistance provided with the Housing Fund monies collected in connection with such projects, such that those receiving the housing assistance could reasonably commute to the commercial locations.

15.94.040 Non-Residential Development Project Housing Impact Fee.

A. Application.

A Housing Impact Fee is hereby imposed on all developers of non-residential development projects. Notwithstanding the foregoing, this fee shall not apply to developers of non-residential projects which fall within one or more of the following categories:

1. Projects that are the subject of development agreements currently in effect with the city, approved prior to the effective date of this chapter where such agreements expressly preclude the city from requiring compliance with this type of housing fee program; or

2. The non-residential uses are set forth either in a building permit application accepted as complete by the city prior to 5:00 p.m. on January 5, 1999, or in a use permit or similar discretionary approval approved prior to 5:00 p.m. on January 5, 1999; however any extension or modification of such approval or permit after such date shall not be exempt; or

3. That portion of a project located on property owned by the State of California, the United States of America or any

of its agencies used exclusively for governmental or educational purposes; or

4. A project to the extent it has received a vested right to proceed without payment of housing impact fees pursuant to state law; or

5. Projects operated by nonprofit organizations which provide food storage, meal service and/or temporary shelter to the homeless; or

6. Projects for which no nexus can be established; or

7. Projects for uses labeled "Exempt" in Table 2 of this Section; or

8. Any building which is damaged or destroyed by fire or natural catastrophes so long as the square footage of the building remains the same.

B. Payment of fee.

Unless otherwise preempted by law, the Housing Impact Fee shall be paid prior to the issuance of a building permit; or upon execution by the developer and owner, if different, of the city's secured building agreement recorded against the property, at the time of final inspection/Certificate of Occupancy. The housing director is hereby authorized to execute such agreements on behalf of the city.

C. Calculation of Housing Impact Fee.

1. The Housing Impact Fee for non-residential development projects shall be charged on a per square foot basis for all new gross floor area, including all additions where floor area is increased, with a specific per square foot amount set for each nonresidential use type identified in Table 1 below. The amount and calculation for each such fee shall be established by resolution of the City Council. Gross floor area is determined by calculating the combined area for all floors in

accordance with the definition of "Gross square feet floor area" contained in Section 15.94.020. If the non-residential development project is in whole or part a replacement for space previously on the site, but demolished within one year prior to the filing of the application for the new construction or remodel, credit shall be given for the space demolished or to be demolished at the rate applicable to the prior use of that space.

TABLE 1

HOUSING IMPACT FEE REQUIREMENT

Type of Use

Office
Hotel
Retail
Industrial
Warehouse (30,000 to 100,000 square feet)*
Warehouse (over 100,000 square feet)
Wine Production

**Warehouse uses of under 30,000 square feet shall be treated as industrial uses.*

2. In calculating the fee, the chief building official shall use those fees of Table 1 and Table 2 in effect by resolution of the City Council at the time of the issuance of the building permit or if no building permit is required, at the time of issuance of a use or other discretionary permit. In the case of large, mixed-use development projects involving the simultaneous construction of different structures and/or different uses, the categories in Table 2 and the types of uses in Table 1 may be used to create a mixed fee to be collected for all uses in the project. In that case, the fee shall be designed to approximate the revenue which would have been collected had

the appropriate type of use category in Table 1 been applied to each individual portion of the project.

3. The type of use subject to the Housing Impact Fee will be determined in the following situations based on a case-by-case calculation of employee density:

a. In the case of uses listed as "Special" in Table 2.

b. In the case of a use which does not fall into one of the uses listed in Table 2 and the housing director determines that (i) the building size is an inappropriate indicator of employee density, or (ii) insufficient generalized information is available to permit a determination that the use falls within one of the use categories listed in Table 2. In the case of uses involving one or fewer employees, which uses shall be exempt from the fee requirement.

c. Upon the remodeling of the building to add additional square footage, the appropriate Housing Impact Fee shall be paid only on the additional square footage.

4. The housing director's determination of employee density pursuant to subsection 3 shall be based on: data concerning anticipated employee density for the project submitted by the applicant; employment surveys or other research on similar uses submitted by the applicant or independently researched by the housing director; or any other data or information the housing director determines relevant. Any application for a non-residential development project where a special fee determination is requested shall be accompanied by information sufficient to enable the housing director to make a determination of employee density pursuant to this subsection.

TABLE 2

NON-RESIDENTIAL LAND USE MATRIX WITH SPECIAL CATEGORICAL FEE DETERMINATIONS AND EXEMPTIONS

Non-Residential Use	Office	Retail	Warehouse	Industrial	Hotel/ Motel	Wine	Special Fee	Exempt
A. Hotels, Motels and bed-and-breakfast inns					X			
B. Commercial Uses General retail and personal service uses including integrated commercial centers.		X						
Furniture, appliance, household equipment; office equipment and sales, service and repair of bulk goods.		X						

Non-Residential Use	Office	Retail	Warehouse	Industrial	Hotel/ Motel	Wine	Special Fee	Exempt
Service commercial and heavy commercial uses (building materials, contractor yard, tool rental bus terminals, print shops, auto parts shops, janitorial services, etc.).				X				
Gas station, service/auto repair including paint and auto body shops.		X						
Eating and drinking establishments.		X						
Commercial amusement and recreation uses.							X	
Commercial plant nurseries.				X				

Non-Residential Use	Office	Retail	Warehouse	Industrial	Hotel/ Motel	Wine	Special Fee	Exempt
C. Office Uses Banking, savings and loans associations; professional, business and administrative offices.	X							
Medical/dental offices and clinics.	X							
Industrial/ Wholesale Uses; self-storage uses.			X					
Wholesale and warehouse uses.			X					
General industrial uses.				X				
Research, development and testing uses.				X				
D. Industrial Uses Public and private elementary schools (grades K-8).								X
Public and private secondary schools.								X

Non-Residential Use	Office	Retail	Warehouse	Industrial	Hotel/ Motel	Wine	Special Fee	Exempt
Public and private college/university.								X
Technical and adult education (business, beauty, barber, trade, technical, vocational and other similar uses).		X						
Hospitals.							X	
Nursery Schools and daycare facility serving even or more children.		X						
Public libraries, art galleries, museums and other non-recreational public facilities.								X
E. Assembly Uses Churches.								X
Funeral homes.		X						
Auditoriums.							X	
Theaters.		X						
Sports arenas.							X	
F. Wine Uses Wine production.						X		

Non-Residential Use	Office	Retail	Warehouse	Industrial	Hotel/ Motel	Wine	Special Fee	Exempt
Wine storage.			X					
Wine tank and crush pads.			X					
Wine visitor centers.						X		
G. Unlisted Uses							X	
H. Exempt or Special Fee Users Agricultural uses.								X
Child care center with six or fewer children								X
Christmas tree sales lot.								X
Fuel yard.							X	
Golf Course.							X	
Marinas.							X	
Nonprofit organization–food preparation of off-site consumption.								X

Non-Residential Use	Office	Retail	Warehouse	Industrial	Hotel/ Motel	Wine	Special Fee	Exempt
Nonprofit organization–food storage and distribution.								X
Nonprofit organization–meal service facility.								X
Public parking lot.								X
Public utility yard.								X
Railroad yard or shop.							X	
Residential care facility–nonprofit.							X	
Residential care facility–private.							X	
Schools–nonprofit.								X
Wholesale stores and distribution.							X	

D. Alternative to Payment of Housing Impact Fee.

As an alternative to payment of the Housing Impact Fee, a developer of a nonresidential development project may submit a request to mitigate the impacts of such development through the construction of residential units, the dedication of land, or mixed use or other resources. Such requests shall be approved by the city council, if the city council determines that such alternative will further affordable housing opportunities in the

city to an equal or greater extent than payment of the Housing Impact Fee.

E. Processing Requirements.

1. Each discretionary permit for a project subject to this section shall contain an express condition requiring compliance with this section.

2. No application for building permits or discretionary permits for any project subject to this section shall be deemed complete unless the application contains (a) a statement of the number of gross square feet in a non-residential development project to be constructed, added, or placed that are subject to the requirements of this section, together with documentation sufficient to support the application; (b) the intended use or uses for the non-residential development project by gross square feet; and (c) a statement of any exemptions applicable to the project.

3. The housing director may require similar information for completeness of other city permits or licenses as necessary or convenient to implement this section.

F. Phase-in Requirements.

Notwithstanding any other provision of this section, any Housing Impact Fee imposed pursuant to this section in connection with a building permit issued for a project approved by use permit or similar discretionary approval between January 6, 1999, and January 5, 2000, shall be reduced by 50% of the amount set by city council resolution and payment of this reduced fee shall constitute full compliance.

15.94.050 Residential development project: Inclusionary/in-lieu fee requirements.

A. Inclusionary requirement.

At least 10% of all new dwelling units in a residential development project shall be affordable units which shall be constructed and completed not later than the related market rate units. For fractions of affordable units, including fractions resulting from construction of less than ten dwelling units, the developer may elect, at his or her option, to construct the next higher whole number of affordable units, perform an equivalency action alternative which has received the approval of council pursuant to subsection B hereof, or pay the In-lieu fee specified in subsection D for such fraction. Notwithstanding the above, this section shall not apply to projects which fall into one or more of the following categories:

1. The construction of a single dwelling unit which is the whole of a residential development project and which is built, owned, and after completion, occupied for two years by a moderate income household verified by the housing director and meets the requirements established by subsection M. For purposes of this exemption, a dwelling unit shall be deemed "built" by its owner if it is built by or for a permit holder who intends to reside in the dwelling unit subject to subsection M hereof; or

2. Projects that are the subject of development agreements currently in effect with the city and approved prior to the effective date of this chapter where such agreements expressly preclude the city from requiring compliance with this type of a housing fee program; or

3. The building permit application for a project for which a use permit and any extensions thereof, was approved prior to January 5, 1999; or

4. A residential development project to the extent it has received a vested right to proceed without payment of housing impact fees pursuant to state law.

5. Building permits for residential development projects if compliance with this section for such project has already been satisfied including, but not limited to, building permits on newly created lots where the subdivider has built affordable units or otherwise satisfied this section.

6. Any dwelling unit which is damaged or destroyed by fire or natural catastrophes so long as the square footage and use of the building remains the same.

7. A building permit application for the first dwelling unit to be constructed on a lot which was legally created prior to January 5, 1999, or created by the recordation of a final or parcel map which conforms to a previously approved tentative subdivision or parcel map so long as such tentative map and any extensions were approved by the city prior to January 5, 1999.

B. Alternative Equivalent Proposal.

A developer of a single-family residential development project may meet the requirements of subsection A hereof by an alternative equivalent action. A developer of a multi-family residential development project may propose to meet the requirements of subsection A hereof by an alternative equivalent action, subject to the review and approval by the city council. A proposal for an alternative equivalent action may include, but is not limited to, dedication of vacant land, the construction of affordable units on another site or acquisition and enforcement of required rental/sales price restrictions on existing standard dwelling units consistent with this section. Any proposal shall show how the alternative proposed will further affordable housing opportunities in the City to an equal or greater extent than compliance with the express requirements of subsection A or compliance with the express requirements of

subsection A or payment of the appropriate in-lieu housing fee. Such proposals for single-family residential developments shall be approved by the city council, if the council determines that such alternative will further affordable housing opportunities in the city to an equal or greater extent than payment of the housing in-lieu fee. Such proposals for multi-family residential developments shall be considered on a case by case basis by the city council and may be approved at the city council's sole discretion, if the city council determines that such alternative will further affordable housing opportunities in the city to an equal or greater extent than compliance with the express requirements of subsection A.

C. In-lieu Housing Fee.

A developer of single family residential development project may meet the requirements of subsection A hereof by payment of an in-lieu fee. A developer of a multi-family residential development may propose to meet the requirements of subsection A. hereof by submitting at the time of application for a discretionary or building permit, whichever comes first, a request to pay the in-lieu fee along with a report identifying all overriding conditions impacting the project that prevent developer from meeting the requirement to construct the affordable units; sufficient independent data, including appropriate financial information, that supports the developer's claim that it is not feasible to construct the required affordable units and a detailed analysis of why the various concessions and incentives identified in subsection F cannot mitigate the developer's identified conditions that are preventing him/her from constructing the affordable units. The planning director and the housing director shall review all such requests and prepare a recommendation for the council. Such requests shall be considered on a case-by-case basis by the council and may be approved, at the council's sole discretion, if the council determines that there are overriding conditions impacting the project that prevent developer of a multi-family residential

development from meeting the requirement to construct affordable units and that payment of the in-lieu fee will further affordable housing opportunities.

D. Time of Payment of In-lieu Fee.

Unless otherwise preempted by law, the housing in-lieu fee shall be paid prior to the issuance of a building permit, or upon execution by the developer and owner, if different, of the city's secured building agreement recorded against the property, at the time of final inspection/Certificate of Occupancy. The housing director is hereby authorized to execute such agreements on behalf of the city.

E. Calculation of Housing In-lieu Fee.

The housing in-lieu fee shall be charged on a percentage basis of the projected construction costs of market rate dwelling units. The amounts and calculation of the housing in-lieu fee shall be established by resolution of the city council. Construction costs of market rate dwelling units is determined in accordance with the definition in Section 15.94.020 which states "Construction costs shall mean the estimated cost per foot of construction, as established by the building department of the City of Napa for use in the setting of regulatory fees and building permits, multiplied by the total square footage to be constructed for each dwelling unit, minus square footage for garage area." For attached single-family residential and rental residential development projects, construction costs shall be separately calculated for each dwelling unit and the appropriate fee paid for each unit within the residential project. The housing in-lieu fee required by this section may be satisfied either by cash payment or upon the recommendation of the housing director and approval of the city council, by an alternative which will provide city with a value equal to or greater than the amount of the required in-lieu fee.

F. Affordable Housing Concessions or Incentives.

1. For residential development projects which meet the requirements specified in subsection A through the actual construction of affordable units, the city shall follow the procedures described below and provide the described concessions and/or those incentives identified in Chapter 17.84 of the Napa Municipal Code:

a. Within ninety (90) days of submittal by a developer of a written preliminary conceptual development proposal prior to the submittal of any formal application for a general plan amendment, rezoning, use permit, tentative subdivision or parcel map or other permit or entitlement describing and specifying the number, type, location and size of the housing development, identifying any requests for density bonus, additional incentives, concessions or waivers or modification of development or zoning standards, necessary to make construction feasible for the proposed development, including the affordable units, the city council shall review the preliminary development proposal at a public hearing noticed in accordance with Napa Municipal Code Section 17.06.070(C) and indicate conceptual approval or disapproval of the proposed development and any requests for additional affordable housing incentives, concessions or waivers or modification of development or zoning standards. Such preliminary approval or disapproval shall not bind the city council but rather shall be subject to the discretion of the city council to modify its preliminary recommendations based upon a full review of all pertinent project information, including any environmental impact report, presented at the public hearing on the application.

b. Applications which include the construction of affordable units shall be processed by all city departments before other residential land use applications regardless of the original submittal date. Applications including affordable rental

units shall be processed before applications including owner-occupied units.

c. All city-required fees on affordable units shall be deferred for payment until the issuance of the certificate of occupancy.

d. For owner-occupied affordable units, the city through the Housing Authority of the City of Napa shall purchase and assume responsibility for marketing and selling an affordable unit that remains unsold upon the issuance of a certificate of occupancy using trust fund or other available funds. Until the issuance of a certificale of occupancy, the developer is responsible for marketing and selling the affordable units.

2. The city council may consider, on a case-by-case-basis, at its sole discretion the provision of the following additional concessions or incentives, identified in Government Code Section 65915 which are consistent with state law and the Housing Element of the City of Napa General Plan for projects which meet or exceed the requirements of Chapter 17.84:

a. An additional density bonus or other incentives of equal financial value subject to the city council's review and approval.

b. Waiver or modification of city standards that have a direct impact on reducing total project costs while being consistent with required Building and Safety Code standards. The developer shall be responsible for documenting that the waiver or modification is necessary for the feasibility of the residential development project and is consistent with required Building and Safety Code Standards.

c. Provision of direct financial assistance in the form of a loan or grant using trust fund or other appropriate available funds subject to the recommendation of the housing director.

d. Deferral of payment of city fees on market rate units until the issuance of the certificate of occupancy for the unit.

3. The city council may consider, on a case by case basis, at its sole discretion, the provision of additional concessions or incentives consistent with state law and the Housing Element of the City of Napa General Plan for residential development projects which provide at least 15% of the total dwelling units as affordable units.

G. Requirements for Rental Affordable Units.

1. One-half of the affordable units which are required to be constructed in connection with construction of rental market rate units shall be available at affordable rents to very low-income households. The remaining one-half of the required affordable units shall be available at affordable rents to low-income households. Where the number of required affordable units is an odd number, the number of affordable units constructed for very low-income households may be one less than the number of affordable units construction for low-income households.

2. With respect to any particular rental residential project, the city council may, upon the recommendation of the housing director, forgive all or a portion of the affordability requirement set forth in subsection A. above upon a showing by the applicant that imposition of such requirement on the residential project will cause undue hardship and that such residential project will contribute significantly to affordable housing opportunities in the city.

H. Requirements for Owner-occupied Affordable Units.

1. One-half of the affordable units which are required to be constructed in connection with the construction of market rate units intended for owner-occupancy shall be available at affordable sales prices to households whose annual household income does not exceed 100% of median income. If one-half

of the affordable units required at an affordable sales price not exceeding one hundred percent (100%) of median income are available at affordable sales prices to households whose annual household income does not exceed eighty percent (80%) of median income, the developer shall be entitled to an additional density bonus of five percent (5%) for the proposed development.

2. As an alternative to receiving an additional density bonus of five percent (5%), a developer may submit a request for another incentive of a financial value equal to the desnity bonus. Such requests shall be considered on a case-by-case basis by the city council and shall be approved, at the city council's sole discretion, if the city council determines that such alternative incentive will further affordable housing opportunities.

3. The remaining on-half of the required affordable units shall be available at affordable sales prices to moderate income households. Where the number of required affordable units is an odd number, the number of units affordable to moderate income households may be one greater than the number affordable at our below 100% of median income.

I. Basic Requirements for Owner-Occupied and Rental Affordable Units

Affordable units shall be comparable in number of bedrooms, exterior appearance and overall quality of construction to market rate units in the same residential project. Subject to the approval of the planning director and housing director, square footage of affordable units and interior features in affordable units may not be the same as or equivalent to those in market rate units in the same residential project, so long as they are of good quality and are consistent with contemporary standards for new housing. Affordable units shall be dispersed throughout the residential project, or, subject to the approval of the planning director and housing director,

may be clustered within the residential project when this furthers affordable housing opportunities.

J. Continued Affordability.

1. Prior to the issuance of certificates of occupancy or approval of the final inspection for affordable units, regulatory agreements and if the affordable units are owner-occupied, resale restrictions, deeds of trust and/or other documents, all of which must be acceptable to the housing director and consistent with the requirements of this chapter, shall be recorded against parcels having such affordable units and shall be effective for a minimum of 30 years with respect to each owner-occupied affordable unit and in perpetuity for rental affordable units.

2. Notwithstanding any other provision in this Section: (a) The maximum sales price permitted on resale of an affordable unit intended for owner-occupancy shall not exceed the seller's purchase price adjusted for the percentage increase in median income since the seller's purchase, plus the value of substantial structural or permanent fixed improvements to the property, plus the cost of reasonable seller's broker fee as determined by the housing director. For purposes of this subparagraph, median income shall be calculated based upon the presumed occupancy levels used to determine affordable sales price, (b) the resale restrictions shall provide that in the event of the sale of an affordable unit intended for owner-occupancy, the city shall have the right to purchase or assign its right to purchase such affordable unit at the maximum price which could be charged to an eligible household.

3. No household shall be permitted to occupy an affordable unit, or purchase an affordable unit for owner-occupancy, unless the city or its designee has approved the household's eligibility, or has failed to make a determination of eligibility within the time or other limits provided by a regulatory agreement or resale restrictions, if the city or its designee maintains a list of eligible households, households

selected to occupy affordable units shall be selected first from that list to the extent provided in the regulatory agreement or resale restrictions.

K. Annual Monitoring and Transfer Fees.

1. For each rental affordable unit provided hereunder, the current owner may be required to pay an annual monitoring fee for the term of required affordability. Such fee shall be specified in the regulatory agreement(s) required hereunder.

2. For each owner-occupied affordable unit provided under this section, the current owner may be required to pay a transfer fee for any change of ownership during the term of required affordability. Such fee shall be specified in the resale restrictions required by subsection J.

L. Discretionary Permit Requirements.

Every discretionary permit for a residential development project approved after the effective date of this chapter shall contain a condition detailing the method of compliance with this chapter. Every final and parcel map shall bear a note indicating whether compliance with the requirements of this section must be met prior to issuance of a building permit for each lot created by such map.

M. Requirements for Certificate of Occupancy/Final Inspection.

1. No temporary or permanent certificate of occupancy shall be issued, final inspection approved or release of utilities authorized for any new dwelling unit in a residential development project until the developer has satisfactorily completed the requirements hereunder, i.e., on-site construction of affordable units, alternative equivalent action(s) or payment of the housing in-lieu fee.

2. No temporary or permanent certificate of occupancy shall be issued, final inspection approved or release of utilities

authorized for a dwelling unit described in subsection A(1) above until the developer has made a showing acceptable to the housing director that such an exemption is appropriate. The housing director shall develop and implement regulations designed to ensure that such initially exempt dwelling units remain in compliance with the terms of the exemption throughout the first two years of occupancy. A developer of a dwelling unit found to be out of compliance at any time during such two-year period shall be required to pay 125% of the then current in-lieu fee for that dwelling unit, as specified by resolution of the city council. Such payment, however, shall not limit the city's ability to proceed against any party pursuant to Section 15.94.060 or other applicable law.

N. Phase-in Requirements.

Notwithstanding any other provision of this section, any housing in-lieu fee or inclusionary requirement imposed pursuant to this section in connection with a building permit or license issued for a project approved between January 6, 1999, and January 5, 2000, shall be reduced by 50% of the amount set by city council resolution, and payment of this reduced fee or meeting 50% of the inclusionary requirement of subsection A shall constitute full compliance.

15.94.060 Enforcement provisions.

A. It shall be unlawful, a public nuisance and a misdemeanor for any person to sell or rent an affordable unit at a price or rent exceeding the maximum allowed under this chapter or to a household not qualified under this chapter, and such person shall be subject to a $500.00 fine per month from the date of original non-compliance until the affordable unit is in compliance with this section.

B. The Napa City Attorney's Office or the Napa County District Attorney, as appropriate, shall be authorized to abate violations of this chapter and to enforce the provisions of this chapter and all implementing regulatory agreements and resale controls placed on affordable units by civil action, injunctive relief, and any other proceeding or method permitted by law.

C. The remedies provided for herein shall be commutative and not exclusive and shall not preclude the city from any other remedy or relief to which it otherwise would be entitled under law or equity.

15.94.070 Annual review.

The Housing Impact Fee, Housing In-lieu Fee and inclusionary requirements authorized by this chapter and implementing resolution(s) shall be renewed annually by the city council.

15.94.080 Adjustment.

A. A developer of any project subject to the requirements in this chapter may appeal to the city council for a reduction, adjustment, or waiver of the requirements based upon the absence of any reasonable relationship or nexus between the impact of the development and either the amount of the fee charged or the inclusionary requirement.

B. A developer subject to the requirements of this chapter who has received an approved tentative subdivision or parcel map, use permit or similar discretionary approval and who submits a new or revised tentative subdivision or parcel map, use permit or similar discretionary approval for the same property may appeal for a reduction, adjustment or waiver of the requirements with respect to the number of lots or square footage of construction previously approved.

C. Any such appeal shall be made in writing and filed with the city clerk not later than ten (10) days before the first public hearing on any discretionary approval or permit for the development, or if no such discretionary approval or permit is required, or if the action complained of occurs after the first public hearing on such permit or approval, then the appeal shall be filed within ten (10) days after payment of the fees objected to. The appeal shall set forth in detail the factual and legal basis for the claim of waiver, reduction, or adjustment. The city council shall consider the appeal at the public hearing on the permit application or at a separate hearing within sixty (60) days after the filing of the appeal, whichever is later. The appellant shall bear the burden of presenting substantial evidence to support the appeal including comparable technical information to support appellant's position. No waiver shall be approved by the city council for a new tentative subdivision or parcel map, user permit or similar discretionary approval on property with an approved tentative subdivision or parcel map, use permit or similar discretionary permit unless the council finds that the new tentative subdivision or parcel map, user permit or similar discretionary approval is superior to the approved project both in its design and its mitigation of environmental impacts. The decision of the council shall be final, if a reduction, adjustment, or waiver is granted, any change in use within the project shall invalidate the waiver, adjustment, or reduction of the fee or inclusionary requirement.

Section 4. The City Council hereby finds and determines that adoption of this ordinance is not subject to the review and recommendation of the City of Napa Planning Commission.

Section 5. This Ordinance shall expire on January 5, 2009, unless a later enacted Ordinance enacted before January 5, 2009, deletes or extends this date.

Section 6. If any section, sub,-section, subdivision, paragraph, clause or phrase in this ordinance or any part thereof, is for any reason held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining sections or portions of this ordinance or any part thereof. The City Council hereby declares that it would have passed each section, sub-section, subdivision, paragraph, sentence, clause or phrase of this ordinance, irrespective of the fact that any one or more sections, sub-sections, subdivisions, paragraphs, sentences, clauses or phrases may be declared invalid or unconstitutional.

MAYOR

/s/ Ed Henderson

ATTEST:

/s/ Pamyla Nigliazzo
City Clerk

STATE OF CALIFORNIA)
COUNTY OF NAPA) SS:
CITY OF NAPA)

I, Pamyla Nigliazzo, City Clerk of the City of Napa, do hereby certify that the foregoing urgency ordinance had its reading on July 6, 1999, and was passed by the following vote:

AYES: Sercu, Techel, Busenbark, Martin and Henderson

NOES: None

ABSENT: None

I, Pamyla Nigliazzo, City Clerk of the City of Napa, do hereby certify that the foregoing ordinance had its second reading on July 20, 1999, and was passed by the following vote:

AYES: Sercu, Busenbark, Martin and Henderson

NOES: None

ABSENT: Techel

ATTEST: /s/Pamyla Nigliazzo
CITY CLERK OF THE
CITY OF NAPA

Appendix H–1

RESOLUTION R1999/161

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF NAPA, STATE OF CALIFORNIA, SETTING THE HOUSING IMPACT FEE AND HOUSING IN-LIEU FEE FOR DEVELOPMENTS WITHIN THE CITY OF NAPA

WHEREAS, the City Council of the City of Napa has adopted Ordinance O1999/19 creating and establishing the authority for imposing and charging a Housing Impact Fee for all non-residential developments and a Housing In-Lieu Fee for residential developments not required to meet the inclusionary requirements of such Ordinance; and

WHEREAS, the City of Napa and Napa County Jobs-Housing Nexus Study, September 1992 (collectively with any update thereto, the "Nexus Report") studied the impacts of contemplated future development on affordable housing demands and needs in the City of Napa, along with an analysis of the need for new affordable housing required by new development was conducted, and said study set forth the relationship between the new development, the required new affordable housing and the estimated total cost of providing that new affordable housing; and

WHEREAS, the Nexus Study was available for public inspection and review fourteen (14) days prior to this public hearing; and

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Napa finds and determines as follows:

1. The purpose of the Housing Impact Fee on non-residential development is to mitigate the additional demand for more housing for low and very low households created by these non-residential developments attracting new employees to the City who will be low and very low income households and will, therefore, compete with present residents for scarce affordable housing units in the City of Napa;

2. The purpose of the Housing In-Lieu Fee on residential development is to mitigate the additional demand on rising land prices caused by new market rate housing absorbing the very limited supply of available residential land, thus, increasing the price of remaining residential land and the cost of building affordable housing creating a barrier to the City retaining a balanced community, with housing available to low and moderate income households;

3. The Housing Impact and Housing In-Lieu Fees collected pursuant to this resolution shall be used to increase and improve the supply of housing affordable to moderate, low, and very low income households in the City of Napa by constructing, rehabilitating or subsidizing affordable housing in accordance with Ordinance O1999/19.

4. After considering the study and analysis prepared by Keyser Marston Associates Inc. entitled "Nexus Study," and the testimony received at this public hearing, the Council approves said study, and incorporates such herein, and further finds that new non-residential and residential development in the City of Napa will generate additional demand for affordable housing in the City of Napa;

5. There is a need in the City of Napa for additional affordable housing consistent with the City's Housing Element of its General Plan;

6. The facts and evidence presented establish that there is a reasonable relationship between the need for additional affordable housing and the impacts of non-residential and residential development for which the corresponding fees are charged, and there is a reasonable relationship between the fees' uses and the type of development for which the fees are charged, as these reasonable relationships or nexus are in more detail described in the study referred to above;

7. The City of Napa wishes to implement the provisions of Ordinance O1999/19 by establishing the amount of the Housing Impact Fee and the Housing In-lieu Fee imposed therein on developers of non-residential and residential development projects consistent with such ordinance.

NOW, THEREFORE, BE IT FURTHER RESOLVED that:

1. Housing Impact Fee. The Housing Impact Fee shall be charged and paid on a per square foot basis for all new gross floor area, including all additions where floor area is increased, for each non-residential use type identified in the following Table 1:

TABLE 1

HOUSING IMPACT FEE REQUIREMENT

Type of Use	Fee Per Sq. Ft.
Office	$1.00
Hotel	$1.40
Retail	$0.80
Industrial	$0.50
Warehouse (30,000 to 100,000 sq. ft.)*	$0.30
Warehouse (over 100,000 sq. ft.)	$0.20
Wine Production	$0.50

**Warehouses uses of under 30,000 square feet shall be treated as industrial uses.*

2. Housing In-lieu Fee. The Housing In-lieu Fee shall be charged and paid on a percentage basis of the projected Construction Costs of Market Rate Dwelling Units in a

residential development project. The Housing In-lieu Fee schedule shall be:

A. For Market Rate Units for which the projected Construction Costs are less than or equal to $86,700.00, no fee shall be charged.

B. For Market Rate Units for which the projected Construction Costs are greater than $86,700.00 but less than $115,250.00, one percent (1%) of the Construction Costs for such units.

C. For Market Rate Units for which the projected Construction Costs are equal to or greater than $115,250.00, two percent (2%) of the Construction Costs for such units.

3. Deposit of Fees. All revenues raised by payment of the fees above shall be placed in the Housing Impact Fee account or the Housing In-lieu Fee account of the Housing Trust Fund.

4. Annual Adjustment. The rates set herein for the Housing Impact Fee shall be adjusted annually on or about June 1st of each year starting in the year 2000 by the percentage change (%) corresponding to the percentage change (%) in the Construction Price Index for a wood frame good dwelling unit in the City of Napa based on the valuation method used to issue Building Permits by the Building Department in the City. The projected Construction Costs of Market Rate Dwelling Units for the Housing In-lieu Fee shall be adjusted annually on or about June 1st of each year starting in the year 2000 by the percentage change (%) equal to the percentage change (%) in the Department of Housing and Urban Development (HUD) published median income for Napa County for that year.

5. Annual Review. On an annual basis, the City Council shall review these fees; to determine whether the fee amounts are reasonably related to the impacts of non-residential and residential development and whether the provision of additional affordable housing is still needed in the City of Napa.

6. Judicial Action to Challenge this Resolution. Any judicial action or proceeding to attack, review, set aside, void or annul this resolution shall be brought within one hundred twenty (120) days.

I HEREBY CERTIFY that the foregoing Resolution was duly and regularly adopted by the City Council of the City of Napa at a regular meeting of said City Council on the 6th day of July, 1999, by the following roll call vote:

AYES: Sercu, Techel, Busenbark, Martin and Henderson

NOES: None

ABSENT: None

ATTEST: /s/ Pamyla Negliazzo
CITY CLERK OF THE CITY OF NAPA

Chapter 17.84

AFFORDABLE HOUSING*

Sections:

17.84.010 Purpose.
17.84.020 Applicability.
17.84.030 Requirements.
17.84.040 Implementation and procedures.
17.84.050 Relationship to Council Policy Resolution No. 8.

** EDITOR'S NOTE: Ordinance No. 096-006, adopted 4/2/96, amended this Code by repealing Chapter 17.84 and adding a new Chapter 17.84 (Sections 17.84.010 through and including 17.84.050). Said former Sections were derived from 17.84.010 Purpose.*

Section 17.84.010 Purpose.

The purpose of this chapter is to satisfy the requirements of Government Code Section 65915 by specifying the methods and procedures by which the City of Napa shall provide density bonuses and other incentives for the construction of certain housing projects which are affordable to lower income, very low income and/or senior households and/or residents, as specified under this chapter and Government Code Section 65915. (Prior code § 30-500)

(Ord. No. O96-006, Rep&ReEn, 04/02/96)

Section 17.84.020 Applicability.

A. The requirements and provisions of this chapter for the granting of incentives to developers of affordable/lower income housing shall apply to the construction of five or more units of housing which satisfies one or more of the following criteria:

1. At least 20% of the total units are designated for lower income households;

2. At least 10% of the total units are designated for very low income households; or

3. At least 50% of the total units are designated for senior citizens.

(Ord. No. O96-006, Enacted, 04/02/96)

Section 17.84.030 Requirements.

A. In addition to satisfying one or more of the criteria for applicability set forth in Section 17.84.020 above, the developer and/or applicant for a housing project for which a density bonus, waiver/modification of development or zoning standards or other incentives or concession is requested shall satisfy the following requirements:

1. The designated units shall be comparable in floor plan, furnishings, materials, construction quality size and exterior design to the non-designated units within the project. Designated units may, at the City's discretion, either be dispersed reasonably throughout the project, or, alternatively, located at specified locations on or off-site. Units allowed under a density bonus pursuant to this chapter may, in the City's discretion, be approved and located off-site.

2. The developer shall enter into an agreement with the City and shall execute any and all documents deemed necessary by the City to ensure the continuing affordability of units designated for lower and very low income households. Where the developer requests, in addition to a density bonus, additional incentives and/or concessions, such agreement shall be for a term of thirty (30) years; provided, however, that such term may exceed thirty (30) years if the City determines that a longer term is required by the construction or mortgage assistance program, mortgage insurance program or rental subsidy program. The term of such agreement shall be ten (10) years where the developer requests only a density bonus.

3. Units designated for rent by lower income households shall be affordable at rents that do not exceed thirty percent (30%) of sixty percent (60%) of area median income. Units designated for rent by very low income households shall be affordable at rents that do not exceed thirty percent (30%) of fifty percent (50%) of the area median income.

4. Units designated for purchase by lower income households shall be affordable according to limits established by the State Department of Housing and Community Development.

5. The developer and/or property owner shall provide the City with a yearly accounting satisfactory to the City of the total units occupied, the total units vacant, the total units occupied by lower or very low income households and the total by which the units set aside fell short of the required number of units.

(Ord. No. 096-006, Enacted, 04/02/96)

Section 17.84.040 Implementation and procedures.

A. To apply for a density bonus or other incentive under this chapter, the developer may submit to the City a written preliminary proposal for the project prior to the submittal of any formal application or request for a general plan amendment, zoning amendment, subdivision map approval or other permit or entitlement. The preliminary proposal shall include and provide information describing and specifying the number, type, location and size of the housing units. The written preliminary proposal also shall include and provide sufficient information to enable the City to determine the project cost per unit of the proposed development, and shall include, without limitation, capital costs, equity investment, debt service, projected revenues, operating expenses and any other information requested by the City in light of the specific proposal at hand. The preliminary proposal shall contain sufficient information to enable the City to determine whether

the waiver or modification of otherwise applicable zoning and development standards is necessary to make the housing units economically feasible.

B. Alternatively, if the developer determines not to submit a preliminary proposal, the developer shall submit a written proposal satisfying each requirement set forth above for preliminary written proposals at the time the developer submits any request or application for a general plan amendment, zoning amendment, subdivision map approval or other permit or entitlement.

C. The City may, in its discretion, waive or reduce the information required pursuant to this section when the developer requests only a density bonus and does not seek any additional incentives, concessions or waivers or modifications of development or zoning standards.

D. Prior to the issuance of any building permit, the developer shall pay any fee(s), as established by resolution of the City Council and/or Housing Authority, in order to enable the City to implement the provisions and requirements of this chapter, including but not limited to fees to: (1) process the request for density bonus, incentives/concession and/or waiver/modification of zoning and/or development standards; (2) prepare contracts and other documents; and (3) monitor contracts and documents for compliance.

E. Within ninety (90) days of receipt of a written preliminary proposal or a written proposal submitted along with a request or application for a general plan amendment, zoning amendment, subdivision map approval or other permit or entitlement under this chapter, the City shall notify the developer in writing of the procedures and manner by which it will provide any density bonus and/or other incentive required by this chapter. Specifically, the City's notification to the developer shall specify whether and in what manner the City shall:

1. Grant a density bonus; and

2. Grant additional concessions or incentives, or, alternatively, find that additional concessions or incentives are not necessary for affordability; or

3. Provide other incentives of equal financial value.

F. The notification provided to the developer by the City pursuant to this chapter shall represent the joint recommendation of those city departments charged with the implementation of this chapter, including Planning, Housing, Community Resources, Economic Development and Public Works. Such notification shall not bind, but rather shall be subject to the discretion of, the City Council, in acting on the project, to modify the recommendation.

G. The City Council shall consider and shall act upon the request for density bonus and/or other incentives/concessions at the time it reviews and acts upon the underlying request and/or application. The City Council shall consider, but shall not be bound by, the recommendation and written response previously provided to the developer by City staff pursuant to this chapter, but instead shall make the final decision, consistent with the procedures set forth under this chapter and this title, in granting any density bonus and/or other incentive/concession.

H. Affordable units under this chapter shall be constructed at the same time as market-rate units. The right to a density bonus or concession under this chapter shall not be transferred to another development or exercised subsequent to the development which is the subject of the application for which the density bonus or concession is sought. Nothing in this section shall prohibit, in the discretion of the Council, a developer who proposes to simultaneously develop two or more parcels located within the City from using a density bonus or

concession obtained under this chapter for one of the parcels on another of the multiple parcels.

(Ord. No. O96-006, Enacted, 04/02/96)

Section 17.84.050 Relationship to Council Policy Resolution No. 8.

The provisions of City Council Policy Resolution No. 8 shall set forth the City's standards for granting density bonuses for projects proposed in RH zones which are designated to be affordable for low income senior citizens.

(Ord. No. 096-006, Enacted, 04/02/96)

(2)

Supreme Court, U.S.
FILED
FEB 8 2002
CLERK

No. 01-893

In The

Supreme Court of the United States

HOME BUILDERS ASSOCIATION
OF NORTHERN CALIFORNIA,

Petitioner,

v.

CITY OF NAPA,

Respondent.

On Petition For Writ Of Certiorari To
The Court of Appeals, State of California

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION IN SUPPORT OF PETITIONERS

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INTERESTS OF THE AMICUS CURIAE

The National Association of Home Builders ("NAHB") and the Building Industry Legal Defense Foundation ("BILD") have received the parties' written consent to file this brief as amici curiae in support of the petitioners. Letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 205,000 builder and associate members throughout the United States, including more than 5,700 members in the state of California. Its members include not only people and firms that construct and supply single family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. NAHB, therefore, is concerned with any judicial decision that calls into question the remedies available to its members under the U.S. Constitution and federal statutes, particularly when such remedies are in any way obstructed by a state court.

Since its inception, NAHB has played an integral role in increasing affordable housing for low-income people. Many of its members, both nationally and in California, construct multifamily buildings, including government-subsidized housing. Therefore, as NAHB works to ensure an affordable housing market exists for buyers, it works to ensure an affordable rental market exists for those who lease their homes.

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[1] Pursuant to Rule 37.6 of this Court, amici state that their counsel authored this brief and amici paid for it. This brief was not written in whole or part by counsel for a party, and no one other than amici made a monetary contribution to its preparation.

NAHB has been before the Court as amicus curiae or as "of counsel" to the landowner in a number of cases involving the rights of property owners and the remedies available to them when their rights are interfered with. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981), *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), *First English Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987), *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), *Yee v. City of Escondido*, 503 U.S. 519 (1992), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), and *Tahoe-Sierra Reservation Council, Inc. v. Tahoe Regional Planning Agency, et al.*, --- U.S. --- (oral argument held January 7, 2002).

BILD is a non-profit corporation, organized and existing under the laws of the state of California. Established in 1987, BILD is dedicated to eliminating barriers to the American dream of home ownership. As an organization wholly owned by the Building Industry Association of Southern California, Inc. ("BIA/SC"), BILD represents and advocates on behalf of more than 1750 BIA/SC member companies in eight chapters in Southern California, including landowners, developers, home builders, and building industry subcontractors of all kinds.

SUMMARY OF ARGUMENT

The California Court of Appeals and other state courts have used the most rudimentary analysis when reviewing fee ordinances, such as the City of Napa's, and have ignored this Court's decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The lower court's simplistic analysis ignores the reality of why a segment of society can afford decent shelter.

Housing affordability is a nationwide problem. There are numerous reasons why a segment of our society cannot afford decent shelter. There are factors that influence the amount of money a purchaser or renter can spend on housing; and there are factors that influence the price of satisfactory housing. In California, the lack of affordable housing is due to job growth, a decline in the number of homes built and the techniques local governments have used to finance public resources. In the City of Napa, the problem was further complicated when the government developed an urban growth boundary thereby capping the amount of developable land. By conducting a simplistic analysis, the court below ignored the realities of Napa housing problem.

REASONS FOR GRANTING THE WRIT

I. ALL FEES AND EXACTIONS MUST BE REVIEWED IN THE CONTEXT OF *NOLLAN* AND *DOLAN*.

In *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), this Court ruled that a compensable taking occurs when a regulation either (1) fails to substantially advance a legitimate state interest, or (2) deprives an owner economically viable use of his property. *See also* John J. Delaney, *What Does It Take To Make a Take?* 27 Urb. Law. 55 (1995) (The *Agins* standard for a taking is a disjunctive test.) In the case below, the California Court of Appeals, under the first prong of *Agins*, determined that the City of Napa's ordinance did not affect a Fifth Amendment taking. Using the first prong of *Agins*, it simplistically reasoned that providing affordable housing is a legitimate state interest, and that by requiring builders to supply that housing (by building it or paying for it), the ordinance substantially advanced that legitimate interest. *Home Builders Association of Northern California v. City of Napa*, 90 Cal.App.4th 188, 195-96 (2001).

The lower court's reasoning, however, could be used to shield any statute or ordinance from takings scrutiny. The analysis in *Home Builders* effectively precludes the rigorous scrutiny this Court requires to determine if land use regulations pass Fifth Amendment muster. As this Court recognized in *Lucas*, "a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations." *Lucas v. South*

Carolina Coastal Commission, 505 U.S. 1003, 1025 (1992).

As the Petitioner's brief provides, state courts are split on whether to review a challenge to legislatively enacted fees in the context of this court's decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).[2] Petitioner's Petition for Writ of Certiorari at 13-19. Read together, these precedents require first an essential nexus between the governmental interest at issue and the actual governmental demand made on the property owner, and second that the governmental demand be "roughly proportional" to the actual impact generated by the development project. *Nollan*, 483 U.S. at 837, *Dolan*, 512 U.S. at 391.

The Court should grant certiorari here to ensure that *Agins* prong 1 can not be satisfied by mere, rote recitation of legislation findings or broad policy objectives. Indeed, in the instant case, the Court should make clear that the City of Napa's ordinance--and all other land use regulations that impose exactions and/or fees as conditions to development--must be assessed under the "essential nexus" requirement of Nollan, and the "rough proportionality" requirement of Dolan. *Nollan*, 483 U.S. at 837, *Dolan*, 512 U.S. at 391.

In failing to apply the *Nollan/Dolan* tests, the court below ignored this Court's reminder that the Fifth Amendment "was designed to bar government from forcing some

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[2] Even the California Supreme Court, in *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996), held that when a development permit exacts a fee as a condition it is appropriate to apply the *Nollan/Dolan* analysis.

people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Furthermore, by not scrutinizing the matter, the court below did not examine the reality behind the affordable housing problem in California or the City of Napa.

II. BUILDERS ARE NOT THE CAUSE OF CALIFORNIA'S AFFORDABLE HOUSING PROBLEM.

A. Housing Affordability Is Influenced By Many Factors Outside The Control Of Builders.

There are numerous factors that affect both the price of housing and the amount homebuyers[3] can spend on decent shelter. Material, land and labor costs, as well as substantial administrative fees all affect housing prices. The amount of money homebuyers can afford is influenced by their incomes and the amount of money they must spend on necessaries, such as food and health care. Housing affordability is therefore a two-sided equation. To get more citizens into decent shelter there must be both a reduction in builders' costs and an increase in the homebuyer's purchasing power. Home Builder Press, *Producing Affordable Housing: Partnerships for Profit* (1999).

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[3] "Homebuyers" refers to both purchasers and renters.

In California, three factors specifically contribute to the housing problem:

the amount of new housing built has declined,
job growth has exceeded housing, and
California's system of local government finance has driven up the cost of homes.

See California Budget Project, *Locked Out: California's Affordable Housing Crisis* 8, 37-41 (2000), *See also* Susanna Kniffen, *Housing Takes Center Stage*, California Real Estate, October 2000, at 16.

In the 1990s, developers in California built about half the number of new homes as compared to the previous two decades.[4] Factors that are responsible for this decline include the early 1990s recession and neighborhood opposition to multifamily housing. California Budget Project, *Locked Out*, supra, at 40. Furthermore, changes to state law made investments in rental housing less desirable, which discouraged production of less profitable affordable housing. *Id.*

In addition, housing production failed to keep up with job growth.[5] In fact, in 1999, only ten California counties built sufficient housing to keep pace with the demand projected for 2003. *Id.* at 38. Because of this job growth, the state's population grew by 611,000 in 2000. Donna Kimura, *State Addresses Housing Crisis With Cautious Optimism*,

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[4] "Between 1990 and 1999, building permits were issued for an average of 110,581 units of housing each year. In contrast, permits were issued for an average of 215,585 units per year during the 1970s and 203,369 units per year during the 1980s." California Budget Project, *Locked Out: California's Affordable Housing Crisis* 8 (2000).

[5] "California's population increased by 4.4 percent, while the supply of housing rose by just 1.6 percent." California Budget Project, *Locked Out*, supra, at 32.

Affordable Housing Finance, October 2001 at 48. Basic economics offers that when demand grows and supply does not, prices will increase.

The final factor that has led to California's affordable housing problem is its system of local finance. The California Budget Project notes that

> Over the past two decades, local officials have turned to fees and exactions imposed on new development to finance the schools, roads, sewers, parks and other basic infrastructure typically needed by new housing developments. . . . The added cost of paying for facilities that were once shared across the entire community increases the cost of housing, pushing homeownership further out of reach of young families and others of modest means.

California Budget Project, *Locked Out*, supra, at 40.

Thus, a variety of factors has caused the California affordable housing problem, and it is therefore unfair to place the burden of repairing the problem with a small segment of society.

B. The City of Napa's Municipal Financing Scheme Combined with Artificial Growth Boundaries Led to Increased Housing Prices.

Nationwide, traditional zoning and land use regulations, and the use of "alternative financing techniques," such as the City's affordable housing ordinance, have driven

housing costs to unnecessarily high levels. *See* Jennifer Morgan, *Zoning for All: Using Inclusionary Zoning Techniques to Promote Affordable Housing*, 44 Emory L.J. 359 (1995), Martin Leitner & Susan Schoettle, *A Survey of State Impact Fee Enabling Legislation, in* Exactions, Impact Fees and Dedications 60 (Robert Freilich and David Bushek ed., 1995). An NAHB survey shows that in major metropolitan areas, "development costs and fees added an average of $21,000 to the cost of a $200,000 home in highly regulated markets." National Association of Home Builders, *Decent Affordable Housing, It's the American Dream* (2001).

The City of Napa is typical of a municipality that has used alternative financing techniques to increase revenue. According to the California Department of Housing and Community Development, development fees for a 25-unit subdivision in Napa add approximately $35,170 per unit. California Department of Housing and Community Development, *Pay to Play: Residential Development Fees in California Cities and Counties, 1999* 67, Table 8 (2001).

Moreover, similar to what occurred in Napa, municipalities around the country have enacted "urban growth boundaries" ("UGB") to control development. A UGB is an artificially designated line beyond which the government prohibits or deters development. They can either be enacted by the legislature or passed by ballot. Many commentators have recognized that these "[a]rtificial land use controls, which affect the availability of land for housing, increase housing costs in the long run." Candida Ruesga, *The Great Wall of Phoenix?: Urband Growth Boundaries and Arizona's Affordable Housing Market*, 32 Ariz. St. L. J. 1063, 1066 (2000); *See*

Wendell Cox and Ronald Utt, *Smart Growth, Housing Costs and Homeownership*, 1426 The Heritage Foundation Backgrounder 6 (2000) (Explaining that restricting the amount of land indirectly raises the prices of homes.)

The policies of Napa County combined with the policies of the City of Napa are a perfect example of artificial controls raising the cost of housing.

> Napa adopted a limit line in 1975 in an attempt to cap the city's population at 75,000. Residential development was still allowed in rural areas, providing a relief valve for the residential housing market. Then, in the early 1990s, the county clamped down on new development. Residential-building permits plummeted by 74.2 percent from 1989 to 1996 as a moratorium on residential permits took effect in the county and a regional-housing recession took hold in the 1990s. As the recession gave way to the current economic boom, building permits increased, but not as quickly as in other parts of the Bay Area without growth boundaries.
>
> An affordability wedge between rural and urban residents [also emerged] in Napa County. As the growth controls took hold, the average value of a single-family home in unincorporated areas of Napa County climbed 158.1 percent to over 373,000 from 1985 to 1997. The average value of a new single-family home in the City of Napa increased by less than half the rate in rural

> areas (66.8 percent), but the rate of increase doubled after the county growth controls created an effective regional-growth boundary.

Samuel Staley and Gerard Mildner, Reason Public Policy Institute, *Urban-Growth Boundaries and Housing Affordability: Lessons from Portland* 2-3 (1999).

Thus, the evidence shows it was the city's fees and growth controls combined with the policies of Napa County that raised home prices and created the affordable housing problem for the city. Government policies, not builders, raised home prices. Therefore, unless there is truly a "nexus" between impacts from development and the lack of affordable housing, and the government demands are "roughly proportional" to that impact, it is unreasonable for the City to exact more property or add more fees to new homes in the name of affordable housing.

C. The City's Ordinance Simply Adds Another Cost to Building a Home.

The impact of Napa's ordinance on homebuilders is severe. It requires builders to sell their product below fair market value, or pay a fee[6], even though it is the government's policies and regulations that force housing prices to rise above an affordable level. The examples

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[6] The City of Napa's Ordinance is either a fee or an exaction, depending on the alternative that the builder chooses. If the builder sells 10% of his or her homes at less then fair market value, then the government has exacted those homes for a public purpose. The other alternative is to pay a fee that is based on the square footage of every home that the builder wishes to construct.

below demonstrate the financial impacts of the City of Napa Ordinance.

Assume that a developer wants to build a neighborhood with twenty 2500 square foot homes.

Pursuant to the ordinance at issue, for example, the developer has the option to sell 10% of his units at "affordable" prices. City of Napa Municipal Code § 15.94.050(A), Petitioner's Appendix G-29. Furthermore, under one alternative, one-half of those units must be "available at affordable sales prices to households whose annual income does not exceed 100% of median income," and the other half must be "available at affordable sales prices to moderate income households." City of Napa Municipal Code §§ 15.94.050 (H)(1) & (H)(3), Petitioner's Appendix G-25-36. Pursuant to the City of Napa's Growth Management Strategy, December 12, 2000 Report To The City Council By The Housing Element Steering Committee, Attachment A, the "affordable" sales price limit for a three-bedroom home for a median income family would be approximately $165,277[7] and the sales price limit for moderately priced three-bedroom home would be approximately $198,333.[8] These numbers can be compared to the price of an average three-bedroom house in Napa, which is $365,000. Kevin Courtney, *Caps On High-end Development Not Included In City Housing*

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[7] This number was approximated as an average of the low and moderate sales prices.

[8] These prices are based on a monthly payment of 33% of gross income. Note that the Napa Ordinance is based on a monthly payment of 30% of gross income. Thus, the affordable sales prices provided herein are actually higher than would be allowed under the ordinance. City of Napa Municipal Code § 15.94.020(C), Petitioner's Appendix G-11.

Plan, Napa Valley Register, December 6, 2000 (visited Jan. 14, 2002) <http://www.napanews.com>.

A second way a builder can comply with the City of Napa's ordinance is by paying an "in lieu housing fee." Pursuant to City of Napa Municipal Code § 15.94.050 (E), Petitioner's Appendix G-32, the fee is a percentage of the "construction costs," as determined by resolution of the city council. Construction costs are "the estimated cost per foot of construction, as established by the building department of the City of Napa . . ." *Id.* Per the city's resolution, the fee is 1% if the "construction cost" is between $86,700 and $115,250 and 2% if the "construction cost" is over 115,250. City of Napa's Resolution R1999/161, Petitioner's Appendix H-4. Furthermore, pursuant to the City of Napa's fee schedule, valuation is based on $90.60 per square foot.

Using the example, the "construction cost" of each 2500 square foot home would be $226,500. This translates into an "in lieu fee" of $4530[9] per home, or $90,600 for the development.

Thus, the City of Napa's ordinance attempts to make home prices more affordable by exacting a builder's product or by adding another fee to the price of a home. The city's reasoning is hard to understand, since these additional fees further raise the actual cost of new housing.

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[9] Note that this $4530 fee is only one of many fees that the builder must pay.

CONCLUSION

In cities around the country and especially in the City of Napa, government has failed to seriously address the problem of housing affordability. Specifically, the City of Napa has instituted fees and enacted growth controls that have increased the price of land and homes beyond which many people can afford. Subsequently, the city enacted an ordinance that requires a small subset of society, residential builders, to help repair a problem caused by the government. This "repair" takes the form of fees and exactions that will further increase the price of a home.

The *Agins* test does not allow a court to make a serious inquiry into whether an ordinance, similar to the one enacted by the City of Napa, is reasonable. Therefore, we suggest that the *Nollan/ Dolan* analysis is appropriate to provide proper constitutional scrutiny in this matter.

For these reasons, the National Association of Home Builders and the Building Industry Legal Defense Foundation urge this Court to grant Petitioner's Petition for Writ of Certiorari and to reverse the decision of the California Court of Appeals.

DATED: February 4, 2002

Respectfully submitted,

Thomas Jon Ward
National Association
of Home Builders

Supreme Court, U.S.
FILED
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No. 01-893

In The

Supreme Court of the United States

HOME BUILDERS ASSOCIATION
OF NORTHERN CALIFORNIA,

Petitioner,

v.

CITY OF NAPA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL, STATE OF CALIFORNIA

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QUESTIONS RESTATED

1. Whether "heightened scrutiny," as set forth in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), or the more deferential "reasonable relationship" test articulated in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), applies to the judicial review of a facial takings challenge to a legislatively-adopted inclusionary zoning ordinance which (1) applies to all proposed new development in the City, (2) imposes no dedication or exaction requirement, (3) restricts only a small percentage of the use of a proposed new development, (4) allows for financial incentives to offset the small restriction, and (5) allows for no administrative "leveraging" of the City's police power against individual developers.

2. Whether the California court of appeal correctly determined, based on the City's 700-page legislative record judicially noticed by the superior court without objection by Petitioner, that the City's zoning ordinance substantially advances a legitimate governmental interest in promoting affordable housing.

3. Whether the California court of appeal correctly determined that a facial constitutional challenge to an inclusionary zoning ordinance is premature when the ordinance contains numerous economic incentives and administrative relief provisions which precluded the court from determining that the ordinance cannot be constitutionally applied under any imaginable circumstance.

QUESTIONS RESTATED – Continued

4. Whether the due process concept of "fair return," previously applied only in price and rent control cases, should be applied for the first time to a land use regulation imposing use restrictions on a small percentage (ten percent) of property proposed for new residential development, and whether, assuming that a fair return standard even applies, a facial due process challenge is premature when it is impossible to determine, until the regulation actually is applied, what if any restrictions on use or future rents may be imposed.

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REASONS FOR DENYING THE WRIT

The land use ordinance at issue in this case requires all new residential developments in the City of Napa to include a small percentage (ten percent) of affordable units. Petitioner asks this Court to invalidate the Ordinance not on the basis of its application to any specific project, but on its face. Contrary to Petitioner's repeated assertions, the City's Ordinance does not require either a dedication or an exaction. Rather, it is a land use regulation which simply restricts the use of a very small percentage of a landowner's development. Nor is the Ordinance targeted to any specific development. It is a legislative enactment applying generally to all new development within the City.[1] And while Petitioner incorrectly suggests that there is conflict among state and federal courts whether the Ordinance should be reviewed under heightened or deferential scrutiny, no such conflict exists to justify certiorari under Rule 10.

To be sure, this is an important case. The affordable housing problem is of crisis proportions in California generally and in the City of Napa in particular. The City based its adoption of the Ordinance on overwhelming documentation of that crisis.[2] But the social importance of

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[1] The Ordinance applies equally to all property in the City, including commercially developed property which must pay a housing impact fee. Petitioner's Appendix ("Pet. App.") at G-18.

[2] The superior court took judicial notice, without objection by Petitioner, of nearly 700 pages of analyses, studies, and other materials considered by the City Council prior to adoption of the Ordinance. Pet. App. at A-4.

this case must be contrasted with its legal redundancy. Indeed, the central question here, the appropriate standard of review, has been the subject of three relatively recent decisions by this Court.

In *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), this Court established a two-pronged "heightened scrutiny" for ad hoc, adjudicative land dedication requirements imposed on an individual property owner as a condition for the issuance of a permit by a local governmental agency. More recently, in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 702-03 (1999), which is not even cited by Petitioner, this Court unanimously noted that such heightened scrutiny under *Nollan* and *Dolan* had never been applied outside the "special context" of land dedication requirements. Not once has this Court suggested, let alone held, that heightened scrutiny under *Nollan/Dolan* apply in the sweeping manner urged here by Petitioner to a legislatively-imposed, generally applicable land use regulation requiring no dedication of land to the City.

Petitioner's fallback argument, that the court of appeal failed to correctly apply even minimal scrutiny, is based upon a selective and distorted reading of the authorities and the court of appeal's opinion. Petition at 20-21. In fact, the court of appeal correctly applied the applicable standard of review articulated in *Agins v. City of Tiburon*, 447 U.S. 255 (1980). Pet. App. at A-7 to A-10. The court concluded, on the basis of established judicial and legislative authority, that creating affordable housing opportunities is a legitimate state interest. *Id.* The court further concluded, on the basis of a voluminous,

undisputed, and judicially-noticed legislative record, that the Ordinance would substantially advance that interest by requiring a modest amount of affordable housing within each new development. *Id.* Moreover, the Ordinance's inclusionary requi ement was premised upon the City Council's legislative determination that new market rate residential developments exacerbate the City's affordable housing problems, not only by depleting scarce available land, but also by introducing new, more affluent residents who demand new commercial services and products which require, in turn, an influx of low-paid workers themselves requiring housing. Pet. App. at G-6 to G-9. Petitioner's threadbare (one paragraph) argument to the contrary ignores this factual finding. This Court's review under Rule 10 is unwarranted.

Petitioner's next argument, that the court of appeal incorrectly analyzed the effect of the Ordinance's waiver provision, fails for a variety of reasons. First, it sets forth no basis for certiorari under Rule 10, but merely argues that the court of appeal erred. Second, it simply ignores the established judicial preference for an individualized, fact-based resolution of constitutional claims. Consistent with that preference, since the availability of a waiver or the application of future affordability restrictions can be determined only upon application of the Ordinance, the court correctly concluded that it was impossible to determine that the Ordinance would be unconstitutional in every application. Pet. App. at A-6 to A-7, A-13 to A-14. That conclusion is neither novel nor controversial. Finally, the entire argument is largely academic since the court also ruled that, with or without a waiver process,

the Ordinance on its face satisfies *Agins'* "substantially advance" requirement.

Once again ignoring Rule 10, Petitioner's last argument is that the court of appeal erred in failing to apply a due process "fair return" standard to the Ordinance. However, the court correctly acknowledged that the fair return concept has no application to zoning regulations that merely restrict the use of land. What is more, in asserting its "fair return" approach to the Ordinance, Petitioner ignores that unlike its claim based on *Agins'* substantially advance requirement, a fair return claim by its very nature focuses on *Agins' **second*** prong – namely, the economic impact of the regulation at issue. Thus, the court of appeal correctly concluded that, in light of the Ordinance's waiver and in-lieu fee provisions, the effects of the Ordinance simply could not be evaluated for purposes of Petitioner's purely facial challenge.

For these reasons, the City respectfully requests that the Court deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The City presents the following Statement of the Case in response to the argumentative and misleading Statement presented by Petitioner.

I. BACKGROUND TO ADOPTION OF ORDINANCE

Petitioner does not dispute, nor could it dispute, that a housing affordability crisis exists in California. This

crisis has been well documented by commentators[3] and by the California Legislature.[4] For their part, California courts have not only acknowledged the State's affordable housing crisis,[5] they have expressly acknowledged that state and local efforts to provide affordable housing have a legitimate governmental purpose.[6] The decisions of this

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[3] *See, e.g.*, Augusta, *Building Housing from the Ground Up: Strengthening California Law to Ensure Adequate Locations for Affordable Housing*, 39 Santa Clara L. Rev. 503, 503-06 (1999); Fox & Davis, *Density Bonus Zoning to Provide Low and Moderate Cost Housing*, 3 Hastings Const. L.Q. 1015, 1015-19 (1976); Padilla, *Reflections on Inclusionary Housing and a Renewed Look at its Viability*, 23 Hofstra L. Rev. 539, 542-46 (1995).

[4] *See, e.g.*, Cal. Health & Safety Code §§ 33250 (West 1999), 50003-50004 (West 1996); Cal. Gov't Code §§ 11346.5, 65009, 65580, 65589.5 (West Supp. 2002), 65852.2, 65913 (West 1997). The California Legislature has adopted a plethora of other laws and programs designed to ameliorate the affordable housing crisis (*see, e.g.*, Cal. Gov't Code §§ 8698-8698.2 (West 1992), 12900-12996 (West 1992 & Supp. 2002), 65008, 65589.5 (West Supp. 2002), 65913 (West 1997), 65915-65918 (West 1997 & Supp. 2002)), and at least two legislative enactments, the Mello Act (Cal. Gov't Code § 65590 (West 1997)), and the Community Redevelopment Law (Cal. Health & Safety Code § 33413 (West 1999)), contain inclusionary requirements.

[5] *See, e.g.*, *Sounheim v. City of San Dimas*, 47 Cal. App. 4th 1181, 1184, 1188-89, 55 Cal. Rptr. 2d 290, 293-95 (1996); *Wilson v. City of Laguna Beach*, 6 Cal. App. 4th 543, 545, 7 Cal. Rptr. 2d 848, 849 (1992).

[6] *See, e.g.*, *Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal. 4th 952, 970-71, 968 P.2d 993, 1004-05, *cert. denied*, 526 U.S. 1131 (1999); *Green v. Superior Court*, 10 Cal. 3d 616, 625, 517 P.2d 1168, 1173-74 (1974); *Terminal Plaza Corp. v. City & County of San Francisco*, 177 Cal. App. 3d 892, 907-12, 223 Cal. Rptr. 379, 387-91 (1986); *Commercial Builders v. City of Sacramento*, 941 F.2d 872, 873-76 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992).

Court are to the same end. *See, e.g., Pennell v. City of San Jose*, 485 U.S. 1, 11-13 (1988).

To address the affordability crisis in Napa, the City adopted the "inclusionary" zoning ordinance, which links the construction of low and moderate income housing to the construction of market-rate housing by requiring lower income units in an otherwise market-driven development.[7] As of 1994, at least 64 California cities and counties had adopted similar inclusionary zoning ordinances.

Contrary to Petitioner's suggestion that the City adopted the Ordinance without study or evidence (Petition at 6), the Ordinance was, in fact, adopted after years of study, consideration, and input from a "broad based community group that included representatives from non-profit agencies, environmental groups, religious institutions, local industries, for-profit developers, and the local chamber of commerce." Pet.

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[7] Petitioner's suggestion (Petition at 3 n.1) that inclusionary zoning is different from zoning that restricts density or setbacks ignores the actual operation and effect of inclusionary zoning. Open space and setback requirements – clearly "zoning" – allow no use of some percentage of regulated property, without the incentives and waivers offered under Napa's Ordinance here, and yet plainly are constitutional. *Agins*, 447 U.S. at 260-63. Because inclusionary zoning similarly limits the use of a small percentage (here ten percent) of property, authorities nationwide accept it as a form of zoning. *See, e.g.*, Dietderich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 Fordham Urb. L.J. 23, 40-41 (1996); Morgan, *Zoning for All: Using Inclusionary Zoning Techniques to Promote Affordable Housing*, 44 Emory L.J. 360, 369 (Winter 1995); Padilla, *supra*, 23 Hofstra L. Rev. at 541 n.2, 551, 570 n.156, 573.

App. at A-2. Moreover, in direct contradiction to Petitioner's statement that no evidence demonstrated that new residential housing contributes to the City's need for low-income housing (Petition at 6), the City Council made numerous findings, all of which were consistent with the previously-conducted studies and analyses contained in the record before the City. The findings included, among other things, that: (1) the City Rural Urban Limit line, which denotes the limits of urban development and acts as an agricultural buffer, leads to a limited supply of available land for development; (2) new market-rate housing absorbs the remaining supply of land available for development within the Rural Urban Limit line; (3) by absorbing the remaining supply of land available for development, new market-rate housing limits the supply of affordable housing; (4) by absorbing the remaining supply of available land, new market-rate housing also increases land prices; (5) new market-rate housing further aggravates the affordable housing crisis by increasing local employment for workers who cannot afford housing in the City; (6) housing price increases already are outpacing incomes and have made housing unaffordable to low-income households; and (7) workers and long-time residents are being forced to reside outside the City due to housing costs. Pet. App. at G-6 to G-9.

II. THE ORDINANCE

Backed by the above findings, the Ordinance requires that ten percent of all new residential dwelling units be affordable. Pet. App. at G-29. However, the Ordinance gives developers of single-family units the option of satisfying the requirement by an "alternative equivalent proposal," including a dedication of land or the

construction of affordable units on another site. *Id.* at G-30 to G-31. Developers of multi-family projects also may, at their option, request relief from the Ordinance's inclusionary requirement by an alternative, if the City Council determines that the alternative results in affordable housing opportunities greater than or equal to those achieved by meeting the inclusionary requirement. *Id.*

Alternatively, a residential developer that chooses not to satisfy the inclusionary requirement may elect to pay an in-lieu fee. Developers of single-family units may choose this option by right. Developers of multi-family units are permitted the in-lieu fee alternative upon a showing of financial infeasibility and "overriding conditions impacting the project that prevent developer . . . from meeting the requirement to construct affordable units. . . ." *Id.* at G-31 to G-32. Any such fees are deposited in the Housing Trust Fund, and may only be used to increase and improve the supply of affordable housing. *Id.* at G-16.

The Ordinance also allows developers to obtain affordable housing concessions and incentives, including expedited processing, fee payment deferrals, marketing assistance, waiver of building standards having impacts on development costs, and additional density bonus incentives. *Id.* at G-33 to G-35.[8] As required under state

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[8] Petitioner's statement that the Ordinance only provides incentives if a developer *"exceeds"* the Ordinance's requirements is wrong. Petition at 5-6. The Ordinance provides that developers meeting the inclusionary requirement will receive, as a matter of right, preliminary development review, expedited processing, fee deferrals, and marketing assistance.

law, the housing density bonuses generally permit a developer to exceed the density limits in the City's zoning ordinance. *See* Cal. Gov't Code § 65915 (West Supp. 2002).[9] In addition to its "alternative equivalent" and in-lieu fee options, incentives, and concessions, the Ordinance also permits any project developer to appeal for a reduction, adjustment, or complete waiver of the inclusionary/in-lieu fee requirements based upon the absence of a reasonable relationship or nexus between the requirements and the impact of the development. Pet. App. at G-40 to G-41. Finally, the Inclusionary Ordinance applies with equal force to all development in the City, including non-residential development. The Ordinance generally requires non-residential development projects to pay a housing impact fee unless the project meets one of the Ordinance's exemptions. *Id.* at G-18 to G-19, G-21 to G-27.

Pet. App. at G-33 to G-35. Other discretionary incentives, including density bonuses and financial assistance, also are available for meeting the Ordinance's requirements. *Id.*

[9] Because such additional units are constructed on land already purchased, with infrastructure already in place, studies have concluded that developers receive more profitable returns under density bonus programs, even when the programs contain inclusionary requirements. Fox & Davis, *supra*, 3 Hastings Const. L.Q. at 1027-28; *see also* Morgan, *supra*, 44 Emory L.J. at 377.

ARGUMENT

I. THE CALIFORNIA COURT OF APPEAL CORRECTLY RULED THAT HEIGHTENED SCRUTINY UNDER *NOLLAN/DOLAN* DOES NOT APPLY TO THE ORDINANCE.

Petitioner's primary argument, that government should not be able to "evade" heightened judicial scrutiny of land use regulations by adopting such regulations legislatively rather than in an individual, adjudicative context (Petition at 11-12), trivializes this Court's takings jurisprudence. The issue is not whether government is evading "searching judicial scrutiny" by acting legislatively; the issue is whether the regulation at issue presents a heightened risk of an extortionate use of the police power to exact unconstitutional conditions. This Court's takings cases make clear that such risk does not exist when the use of the police power involves no more than the legislative adoption of generally applicable limitations on the use of property, and does not require a dedication of land.

The very term "heightened scrutiny," of course, assumes that there exists a baseline level of scrutiny which is lower. Under such normal, "baseline" review, land use regulations constitute an exercise of the police power to which courts, as a general matter, defer. Commencing with *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926), courts have recognized that the police power is not a circumscribed prerogative, but is elastic, capable of expanding to meet the changing conditions of modern life. *See also Agins*, 447 U.S. at 260-63; *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124

(1978); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 4-6 (1974). Consequently, courts afford great deference to legislative exercises of the police power. The determination of the necessity and form of regulations enacted pursuant to the police power is primarily a legislative, not judicial, function, tested in the courts not by what judges may think of the wisdom or necessity of a particular regulation but solely by whether any reasonable basis exists for the legislative determination. If the validity of the legislative enactment is fairly debatable, the legislative judgment will not be disturbed. *Euclid*, 272 U.S. at 388. Courts "do not sit to determine whether a particular housing project is or is not desirable," but defer to cities' purely legislative prerogative to adopt zoning and land use ordinances that address not only the physical and aesthetic attributes of a community, but also its socio-economic balance. *Village of Belle Terre*, 416 U.S. at 4-6. The burden thus properly rests with the party challenging a generally applicable exercise of the police power to prove that it is clearly arbitrary, having no reasonable relation to the public health, safety, morals, or general welfare. *See Dolan*, 512 U.S. at 391 n.8; *Agins*, 447 U.S. at 260.

Therefore, the City's Inclusionary Ordinance must be upheld if any reasonable basis for its adoption exists. Under such minimal scrutiny, the City need not demonstrate an essential "nexus" or "rough proportionality" between the Ordinance and new residential housing development. Rather, the Ordinance may be justified by the general public need for affordable housing, the limited amount of available land within the City's boundaries, and the exacerbation of the affordable

housing crisis by the development of market-rate housing. This Court has recognized only a narrow class of cases justifying a more careful, intermediate, non-deferential review.

In *Nollan v. California Coastal Comm'n*, the Court struck down permit conditions requiring the dedication of a lateral access along beachfront property, and in so doing established the "essential nexus" test, the first prong of what has come to be known as "heightened scrutiny." Yet contrary to Petitioner's suggestion, the Court did not hold that heightened scrutiny applies to all land use regulations, exactions, or conditions, irrespective of their nature or method of imposition. Rather, in *Nollan* the Court repeatedly emphasized its concern that an adjudicative process not be used to leverage or "extort" a dedication of land as a condition for the issuance of a permit to an individual property owner. 483 U.S. at 832-34.

Similarly, in *Dolan v. City of Tigard*, in which the Court established its "rough proportionality" rule as the second prong of heightened scrutiny, the conditions at issue were not land use restrictions (i.e., zoning), but were dedication requirements imposed on an individual permit applicant. In invalidating the ad hoc land dedication condition imposed on Mrs. Dolan, the Court expressly distinguished those cases involving "essentially legislative determinations classifying entire areas of the city" and imposing "simply a limitation on the use" of property, from cases involving "an adjudicative decision to condition petitioner's application for a building permit on an individual parcel" on "a requirement that [the owner] deed portions of the property to the city." 512 U.S. at 385.

Most recently, the Court again confirmed the limits of heightened scrutiny under *Nollan* and *Dolan* in *City of Monterey v. Del Monte Dunes*. There, the Court unanimously overruled the Ninth Circuit's application of *Dolan* to a city's repeated adjudicative denials of an individual property owner's development proposal. In so doing, the Court stated "we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions," which the Court defined as including "the dedication of property to public use" and "dedications demanded as conditions of development." 526 U.S. at 702-03.[10]

In contrast to cases of individualized exactions, when, as here, an ordinance applies to "a large number of parcels," there are "assurances against arbitrariness." *Penn Central*, 438 U.S. at 135 n.32; *see also Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring) ("[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally."). What is more, while mere restriction on the use of property, by traditional zoning or other economic regulation, has always been judged deferentially under a relaxed standard of review (*see, e.g.*,

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[10] Similarly, in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), five justices agreed that the Takings Clause does not even apply to governmental actions that simply impose a financial obligation upon a party without affecting an identified property interest. *Id.* at 540-47 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 544-56 (Breyer, J., dissenting).

Euclid, 272 U.S. 365), actual land dedication conditions implicate the most fundamental of constitutional protections, namely, the right to exclude others from private property and to receive just compensation when forced to actually deed property to the government (*Dolan*, 512 U.S. at 385; *Nollan*, 483 U.S. at 831-32).

Because Napa's Ordinance was legislatively adopted, is broadly applicable to all property citywide,[11] and requires neither the dedication of property nor payment of money, none of the potential abuses and risks underlying the application of heightened scrutiny exist. Under the Ordinance's core inclusionary requirement, ownership of every unit in a proposed development, including the ten percent affordable units, remains with the private property owner. This classic land use limitation, even in its most extreme application, merely restricts the use of ten percent of a project's units while allowing generous financial incentives to offset such restrictions. The Court should decline Petitioner's invitation to broaden the application of heightened scrutiny under such plainly inapplicable circumstances.

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[11] Petitioner's assertion that the Ordinance is targeted to specific landowners (i.e., residential developers) is simply wrong. The Ordinance applies to every property in the City, whether developed residentially or commercially. Pet. App. at G-18 to G-28, G-29 to G-39. In any event, however, this Court has rejected similar arguments that land use ordinances lack uniformity of application simply because they apply to a class of persons or properties. *See Penn Central*, 438 U.S. at 132.

II. THE STATE AND FEDERAL DECISIONS CITED BY PETITIONER DO NOT CONFLICT WITH THIS COURT'S DECISIONS.

Seeking to manufacture a basis for review under Rule 10, Petitioner argues that "the holdings of several states confirm that generally applicable, legislative enactments are subject to the standards established in *Nollan* and *Dolan*." Petition at 13-17. In reviewing these decisions, however, Petitioner either ignores their context, namely, that the condition or exaction at issue in fact required actual land dedication, or disregards their vintage, namely, that the case either was decided before *City of Monterey v. Del Monte Dunes* or was subsequently disapproved. We discuss these decisions in the order presented by Petitioner.

New York: Petitioner cites two cases, *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (N.Y. 1989), and *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995). Both cases, however, were decided prior to this Court's decision in *City of Monterey*. The New York high court thus no longer follows them. *See, e.g., Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 721 N.E.2d 971 (N.Y. 1999), *cert. denied*, 529 U.S. 1094 (2000).

Ohio: While in the decision cited by Petitioner, *Home Builders Ass'n of Dayton v. City of Beavercreek*, 729 N.E.2d 349 (Ohio 2000), the Ohio Supreme Court applied heightened scrutiny under *Nollan/Dolan* to a legislatively-imposed traffic impact fee, the impact fee at issue was imposed in most instances in lieu of street dedication requirements. Such a fee is nothing like the Ordinance

here, which simply limits use of a small percentage of a development project and allows (but does not require) a fee as an option to developers. Moreover, the decision appears to have overlooked this Court's limitation in *City of Monterey* on the application of *Nollan/Dolan* to land dedication requirements. Review by this Court is not warranted on the speculative assumption that Ohio's courts may continue to ignore *City of Monterey* in future cases.

Oregon: Petitioner cites *J.C. Reeves Corp. v. Clackamus County*, 887 P.2d 360 (Or. App. 1994), and *Schultz v. City of Grants Pass*, 884 P.2d 569 (Or. App. 1994). However, both cases involved the adjudicative imposition of land dedication requirements on individual property owners, as in *Dolan*. They do not, as Petitioner suggests, stand for the broader proposition that heightened scrutiny applies to generally applicable land use legislation that requires no land dedication.

Washington: *Sparks v. Douglas County*, 904 P.2d 738 (Wash. 1995), and *Trimen Dev. Co. v. Kings County*, 877 P.2d 187 (Wash. 1994), also fail to support Petitioner's position. *Sparks*, as Petitioner acknowledges, involved a dedication. Although *Trimen* involved an in-lieu fee, that fee was itself required as an alternative to land dedication. Both cases thus square with *Dolan*.

Illinois: The two Illinois cases cited by Petitioner, *Northern Illinois Home Builders Ass'n v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995), and *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380 (Ill. App. 1995), *cert. denied*, 519 U.S. 976 (1996), are similarly unavailing. Although the *County of Du Page* decision involved a fee, it was

decided well before this Court's decisions in *City of Monterey* and *Eastern Enterprises*. There is no indication that the Illinois courts, like New York's courts, will not limit future rulings. Moreover, the decision in *Amoco Oil Co.* involved the imposition of a land dedication requirement and thus is consistent with *Dolan* in that respect.

First Circuit: Petitioner's citation to the decision in *City of Portsmouth v. Schlesinger*, 57 F.3d 12 (1st Cir. 1995), also fails to suggest any conflict in this Court's application of heightened scrutiny. First, the case did not involve a legislatively-adopted inclusionary or fee requirement. Rather, it again involved the kind of ad hoc, adjudicative requirement found objectionable under *Nollan/Dolan*. Specifically, the City of Portsmouth required an individual developer to pay a fee negotiated solely with the developer as leverage for a permit. Second, *Schlesinger* was decided before this Court's decision in *City of Monterey*. Again, this Court should not join in Petitioner's assumption that the First Circuit – or any other court – will ignore that decision prospectively.

In sum, the cases cited by Petitioner fail to demonstrate any conflict justifying review under Rule 10.

III. PETITIONER'S ARGUMENT THAT ITS FACIAL CLAIM IS NOT "UNRIPE" DISREGARDS THAT THE COURT OF APPEAL CONCLUDED NOT ONLY THAT THE ORDINANCE CAN BE WAIVED, BUT THAT IT SATISFIES *AGINS'* "SUBSTANTIALLY ADVANCE" STANDARD.

Petitioner urges that the court of appeal erred by disregarding *Agins'* first (substantially advance) prong,

ruling instead that Petitioner's facial attack was "unripe." Petition at 21-25. The court of appeal did no such thing and, in fact, never uttered the word "ripe" in its decision. Rather, the court of appeal preliminarily concluded that, in light of the Ordinance's administrative "relief valves" and waiver provision, this case presented the type of abstract and hypothetical claim over which the courts regularly deny anticipatory review because further administrative implementation of the Ordinance may reduce or avoid constitutional problems, or change the nature of the issues presented.[12] The court then proceeded to analyze the Ordinance under *Agins*, expressly concluding that the Ordinance substantially advances the City's legitimate governmental interest in creating affordable housing. Pet. App. at A-6 to A-10. That conclusion, ignored by Petitioner, presents no important question of law – it is consistent with the settled authority of this Court.

By miscasting the court of appeal's opinion as an improper "ripeness" decision, Petitioner attempts to evade the "uphill battle" confronting its facial challenge.

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[12] This case is not analogous, as Petitioner suggests, to a case involving a suspect classification or a case in which the only constitutional application of the regulation is by waiver of the regulation. Petition at 22. In this case, the waiver provision is not necessary to the constitutional application of the Ordinance. The court of appeal concluded, based on the record herein and the applicable standard of review, that the Ordinance could be applied constitutionally even in the absence of a waiver. Pet. App. at A-6 to A-10. As the court noted, the waiver merely is available in those cases in which the application of the Ordinance would yield an unconstitutional result under *Agins'* second prong addressing economic impacts. *Id.* at A-4.

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987). Indeed, Petitioner's argument that there is no circumstance in which the Ordinance can be applied lawfully, because the construction of residential housing in no way exacerbates any shortage of affordable housing (Petition at 23), not only persists in advocating the wrong procedural and constitutional standards, it ignores the City Council's legislative findings to the contrary.

Procedurally, Petitioner is wrong that the complaint's allegation that every application of the Ordinance is unconstitutional must be accepted as true. Petition at 24. On a facial challenge, the question whether an unconstitutional application of a regulation can be avoided is not governed by the conclusory allegations of the complaint. Rather, it turns upon the court's appraisal of the legal effect of the regulation. *Agins*, 447 U.S. at 259 n.6; *Keystone*, 480 U.S. at 494-96.

Constitutionally, Petitioner's argument that there is no circumstance in which the Ordinance can be applied lawfully, because (Petitioner unilaterally concludes) the construction of residential housing in no way exacerbates any shortage of affordable housing, is based upon the erroneous application of the *Nollan/Dolan*. The City has established above that those standards do not apply to the Ordinance. Under the correct standard of review, a determination of the necessity and form of regulations enacted pursuant to the police power is a legislative, not judicial, function, tested in the courts not by what judges may think of the wisdom or necessity of a particular regulation, but solely by whether any reasonable or fairly debatable basis exists for the legislative determination. *Euclid*, 272 U.S. at 388.

But Petitioner not only misapprehends the correct standard of review, it continues to ignore the record below. The courts below took judicial notice, without objection, of nearly 700 pages of reports, studies, and other materials. Pet. App. at A-4. Based on that evidence, the City found, among other things, that there is a limited supply of developable land in the City, that new market-rate housing absorbs the scarce remaining supply of land available for affordable housing[13] and increases land prices, and that new market-rate housing contributes to the demand for goods and services in the City, increasing local employment at wage levels which often do not permit employees to afford housing in the City. Pet. App. at G-6 to G-9.[14] In light of these legislative findings,[15] the court of appeal was not required to accept Petitioner's bare, contrary conclusion that market-rate housing could never exacerbate the shortage of affordable housing. Rather, the court of appeal properly concluded as a

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[13] The scarcity of land capable of development for affordable housing is one of the classic justifications for inclusionary and affordable housing linkage fee requirements. *See, e.g., Holmdel Builders Ass'n v. Township of Holmdel*, 583 A.2d 277, 285 (N.J. 1990); Padilla, *supra*, 23 Hofstra L. Rev. at 544.

[14] This finding is similar to the finding upon which an affordable housing "linkage fee," imposed on new commercial development, was upheld in *Commercial Builders v. City of Sacramento*, 941 F.2d at 873.

[15] Such findings, of course, are presumed correct and factually supported. *See, e.g., Standard Oil Co. v. City of Marysville*, 279 U.S. 582, 586 (1929). Not once in this litigation has Petitioner even mentioned, let alone challenged, either the existence of, or the factual support for, the City Council's legislative findings.

matter of law that Petitioner could not establish that the City's determinations were clearly arbitrary and without reasonable relationship to the public health, safety, morals, or general welfare.

Fundamentally, Petitioner's arguments are irreconcilable with this Court's seminal decision in *Penn Central Transp. Co. v. New York City*. In *Penn Central*, it mattered not whether the perceived problem was created by past city policies (as Petitioner complains here), or whether the proposed development caused the problem or was even beneficial. Indeed, the landmark preservation ordinance was enacted to address problems created by past city policies that allowed destruction of historic properties. 438 U.S. at 108. Consequently, it was insufficient below, and is insufficient here, for Petitioner to merely allege that there are no circumstances in which the Ordinance can be lawfully applied because the construction of residential housing in no way exacerbates any shortage in low-income housing. The City found differently on the basis of an unchallenged record. The constitutional validity of its actions turn merely on whether those findings, and the City Council's legislative judgment, were debatable. Courts do not sit in judgment of such legislative decisions, which necessarily balance and adjust local planning and the economic consequences which follow. Nor is there constitutional mandate for the proposition, urged by Petitioner, that cities must require growth and urban sprawl willy-nilly in order to justify a modest land use restriction to provide housing for all segments of economic society.

IV. THE COURT OF APPEAL CORRECTLY REFUSED TO APPLY THE "FAIR RETURN" STANDARD FOR THE FIRST TIME TO A LAND USE REGULATION AND TO REACH A DECISION ON THE APPLICATION OF ORDINANCE PROVISIONS WHICH HAVE NOT BEEN APPLIED.

Petitioner's final argument is that the Ordinance's inclusionary requirement, on its face, may deprive future owners of a multi-family rental development of a "fair return" on the ten percent of the development's units which are required to remain affordable. Yet, while Petitioner objects that the court of appeal misconstrues the nature of its due process claim (Petition at 27), the court of appeal simply refused to extend, for the first time, the "fair return" standard to local land use regulations. As the court of appeal noted, no authority exists for the proposition that local governments are required to assure developers a "fair return," or a profit in any form. The court correctly found no justification to make new law in this case – particularly when it cannot be determined on this facial challenge how, or if, the Ordinance's future affordability conditions will be applied. Petitioner demonstrates no basis to justify this Court's review of that decision under Rule 10.

The "fair return" concept originated in railroad and utility regulation (*see Federal Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 575 (1942)), where it applied to owners of fixed assets whose revenue from the continued operation of those assets was regulated. The "fair return" standard subsequently was extended to rent control, which made apartment owners, like utilities and

railroads, the owners of assets in place whose operating revenues are regulated. *See, e.g., Pennell v. City of San Jose,* 485 U.S. 1. No case, however, has applied a "fair return" analysis to land use regulations governing new development. Of course, the reason is that the development of property involves both the possibility of profits far in excess of a "fair return" on the one hand, and a calculated risk of economic loss on the other. The benefits and burdens of local land use regulations have been part of this balance of risk and reward dating back, at least, to *Euclid v. Ambler Realty Co.,* in which the Court upheld the constitutionality of local zoning.

Local government is not obligated to adjust its zoning to permit greater profits to new development in the name of a "fair return." Indeed, under California law developers have no recognizable property interest to develop property which would give rise to a "fair return" right. Because development proposals require discretionary city approval (either of a use permit or tentative map), they represent only a unilateral desire by the property owner/developer and not a "legitimate claim of entitlement to a benefit." *Breneric Assocs. v. City of Del Mar,* 69 Cal. App. 4th 166, 181-84, 81 Cal. Rptr. 2d 324, 334-36 (1998); *Clark v. City of Hermosa Beach,* 48 Cal. App. 4th 1152, 1180-84, 56 Cal. Rptr. 2d 223, 240-42 (1996), *cert. denied,* 520 U.S. 1167 (1997). For these reasons, the court of appeal correctly "doubted" the viability of Petitioner's due process "fair return" claim. Nevertheless, even assuming that such right to a "fair return" existed, the court also correctly concluded that consideration of such a claim was premature.

Ignoring this, Petitioner below complained that the Ordinance does not guarantee a "fair return" on investment to developers because no consideration is given in the Ordinance to how much it will actually cost to develop the affordable units. Pet. App. at A-12 to A-13. While Petitioner now refocuses its novel claim on the subsequent landlord who allegedly has no resort to the administrative relief provisions of the Ordinance (Petition at 27-30),[16] the court of appeal correctly concluded that Petitioner's due process claim was premature. Indeed, that conclusion is even more apt if the allegedly aggrieved party is a subject landlord and not the present developer. The question is not, as Petitioner urges, whether an administrative relief procedure will be available to a subsequent landlord; the question is whether it is possible to know exactly how, or even *if*, the Ordinance's long-term affordability provisions will be applied. The court of appeal concluded that it was not possible because there are alternatives available, including an in-lieu fee, which avoid the future affordability provisions altogether. There are also provisions to "reduce, modify or waive" the Ordinance's requirements. Pet. App. at G-40.[17] In addition, the

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[16] For purposes of this Brief, the City assumes but does not concede that Petitioner, an association of "builders, contractors, and related trades and professions" (Pet. App. at A-4), has standing to raise the claims of subsequent landlords. *See Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *cf. Pennell v. City of San Jose*, 485 U.S. at 6-7.

[17] These features, of course, further distinguish the Napa Ordinance from rent control and other forms of price controls to which due process "fair return" standards do apply. Unlike the Ordinance here, no rent control law of which the City is aware

Ordinance provides that the future affordability provisions, *if any*, will be implemented through regulatory agreements recorded against the affected parcels. Pet. App. at G-40. Of course, Petitioner's contention that landlords' rights, if any, to a "fair return" will not be protected is speculative and premature since no such regulatory agreements are before the Court. In light of this record, and in accord with well-settled authority, the court of appeal properly held that Petitioner could not sustain a facial due process challenge on the basis of facts that do not, and may never, exist.

CONCLUSION

The City respectfully requests the Court deny the Petition for Writ of Certiorari.

Dated: February 19, 2002.

Respectfully submitted,

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permits a landlord to wholly and voluntarily "opt out" of the control by paying an in-lieu fee.

Supreme Court, U.S.
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No. 01-893

IN THE

Supreme Court of the United States

HOME BUILDERS ASSOCIATION OF NORTHERN CALIFORNIA,

Petitioner,

v.

CITY OF NAPA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, STATE OF CALIFORNIA

BRIEF IN OPPOSITION FOR RESPONDENTS NAPA VALLEY COMMUNITY HOUSING, *et al.*

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QUESTIONS PRESENTED

1. Whether Petitioner's facial challenge under the Takings Clause to an ordinance requiring that a small percentage of the units in new residential developments be used for housing affordable to low- and moderate-income persons is ripe for review, when (a) the complaint does not contain a single allegation regarding the economic impact of the challenged ordinance on the property of Petitioner or its members; (b) the record contains no information regarding the application or impact of the ordinance; (c) the ordinance contains a host of provisions that mitigate or eliminate any adverse impact on individual developers; and (d) Petitioner complains that the City has failed to show that a "rough proportionality" exists between the ordinance and the adverse impact which new residential developments have on the City's supply of affordable housing.

2. Whether the "rough proportionality" requirement imposed on individualized exactions of property under *Dolan v. City of Tigard*, 512 U.S. 374 (1994), applies to an ordinance requiring that a small percentage of the units in new residential developments be affordable to low- and moderate-income persons, where the ordinance does not take any property interest from the developers or require developers to dedicate any property but merely limits the use of a small percentage of their property.

RULE 29.6 STATEMENT

The list of parties contained in the petition for certiorari is correct. The entity Respondents (Napa Valley Community Housing, a California nonprofit corporation; Non-Profit Housing Association of Northern California, an unincorporated association; and Housing California, a California nonprofit corporation) do not have any parent corporations. There are no publicly traded corporations that own 10% or more of the stock of these non-profit corporations.

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INTRODUCTION

The City of Napa, California (the "City") adopted an ordinance (the "Ordinance") that requires the developers of new residential housing to devote 10% of their units to meet the housing needs of low- and moderate-income individuals and families. The Ordinance was enacted in response to a grave shortage of affordable housing that has already caused severe personal hardship to numerous City residents and that could lead in the future to diminished economic growth within the City.

Petitioner contends, *inter alia*, that the Ordinance is unconstitutional on its face under the Takings Clause. But the Takings Clause allegations in Petitioner's complaint do not contend that the Ordinance has been or will be unconstitutionally applied; that it has deprived or will deprive Petitioner or its members of a fair return on their investments; or that it will deprive Petitioner or its members of all economic use of their properties. Indeed, Petitioner's Takings Clause claim does not contain so much as *a single allegation* concerning the economic impact of the Ordinance. Instead, Petitioner's challenge under the Takings Clause is based wholly on its claim that the City has failed to show that a "rough proportionality" exists between the City's lack of affordable housing and the construction of new houses.

The California courts properly rejected this novel and untenable claim, and there is no reason why this Court should review their decision. The Court has long recognized that claims under the Takings Clause are best adjudicated in the context of a record that shows the specific burden which the challenged statute or ordinance imposes on the claimant. Yet Petitioner's complaint in this case contains no such facts.

Accordingly, this case is indistinguishable from *Pennell v. City of San Jose*, 485 U.S. 1 (1988), where the Court refused to consider a takings claim that is constitutionally identical to the claim presented here.

For that reason alone, the Court should deny the petition. If the Court wishes to review the propriety of ordinances similar to the one challenged here, it should await a case with a factual record that fully describes the actual operation of the ordinance and, in particular, its adverse economic impact, if any, on the parties seeking relief. *See* Part I, *infra*.

Even if this case were ripe for review, Petitioner's Takings Clause claim is meritless under well-settled principles. Although a facial challenge requires a showing that the challenged statute or ordinance can never be constitutionally applied, Petitioner's complaint contains no such allegation. And while Petitioner contends that the City has failed to show that a "rough proportionality" exists between the development of new residential housing and the lack of affordable housing within the City, the "rough proportionality" requirement established by *Dolan v. City of Tigard*, 512 U.S. 374 (1994), does not apply to this case. This Court's decision in *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999), which Petitioner does not cite, recognized that heightened scrutiny under *Dolan* does not apply outside the "special context" of land dedication requirements. This limitation makes perfect sense. *Dolan* applies only when a public entity requires the dedication of land, and the requirement would constitute a taking if it were not imposed as a condition for obtaining a governmental permit or benefit. However, the Ordinance does not meet this threshold requirement. It does not require a property owner to dedicate land but only to use a small percentage of

its property in a particular manner. The developer is free to own, sell or jointly develop the affordable units that constitute the required use. Moreover, *Dolan*'s "rough proportionality" requirement does not apply to facial challenges; until a land use regulation has been applied to a specific landowner, there is no "proportionality" to measure. *See* Part II, *infra*.

The Ordinance is no different constitutionally from any other zoning legislation that restricts the use of particular property, but nevertheless leaves the property owner free to use that property profitably. Indeed, the Ordinance is even less restrictive than a zoning requirement that prevents a property owner from using its property to maximize economic return. The Ordinance affects only 10% of a developer's residential units, while zoning requirements commonly regulate use of the entire property. In short, Petitioner's challenge to the Ordinance raises no novel issues of law, but is instead barred by long-standing precedent that this Court should not disturb.

STATEMENT OF THE CASE

The California Legislature has found "that there exists a severe shortage of affordable housing, especially for persons and families of low and moderate income. . . ." CAL. GOV'T CODE § 65913(a). This shortage is particularly severe in the City of Napa. The Association of Bay Area Governments has calculated that the City's share of the regional need for new housing over the next five years is approximately 3,000 units, of which nearly 1,000 units will be needed to house low-income and very-low-income families. JA 45-46.[1]

1. "JA" refers to the parties' Joint Appendix in Lieu of Clerk's Transcript, filed in the California Court of Appeal.

Yet only eighty-six new apartment units were built in the City between 1992 and 1997. JA 44.

In the spring of 1999, a survey of nearly a fifth of the City's rental units found that the City's vacancy rate was slightly over two-tenths of one per cent (0.2%). JA 794. Most of the residential housing development in recent years has been high-end luxury homes. This high-end development provides housing for relatively few families per acre (four or five, as opposed to up to twenty for multifamily development), uses up the dwindling inventory of land available to meet the City's affordable housing needs and fails to provide housing affordable to most Napa residents. JA 356, 550, 686, 794. Not only are new affordable units not being built, existing rental units are being converted to other uses. JA 356, 794. In addition, a recently enacted flood-control measure is likely to result in the loss of hundreds of additional units, mostly in low-rent but substandard buildings that have been subject to recurrent flooding. JA 794.

The demand for affordable housing in the City far outstrips the supply. The City's Housing Authority has a waiting list of over 1,000 households for its affordable housing and housing subsidy programs. JA 795. Respondent Napa Valley Community Housing ("NVCH") has a waiting list of approximately two hundred households for its current affordable housing units. JA 799. When NVCH completed its most recent affordable housing complex in the City of Napa, offering thirty-nine units for rent, it received 525 applications. JA 799. Until an adequate supply of affordable housing becomes available, many low-income individuals and families will continue to pay a disproportionate share of their meager earnings for rent, live in substandard conditions, move in with friends or relatives (who, of course, may not

always be available or willing to help) or sleep on the streets or in homeless shelters.

The lack of affordable housing has created economic and environmental problems for the entire City, in addition to the hardship it has imposed on low-income individuals and families. Lower income families who work in the City are increasingly forced to live at greater distances from their places of employment, which increases traffic congestion and pollution. Moreover, if not remedied, the lack of affordable housing will ultimately lead to a shortage of jobs and decreased economic growth. JA 686, 737, 739.

The Ordinance represents a reasonable accommodation between the City's need for affordable housing and the interests of private developers. As the California Court of Appeal noted, it was based on the recommendations of the "Napa Affordable Housing Task Force" "that included representatives from non-profit agencies, environmental groups, religious institutions, local industries, for-profit developers, and the local chamber of commerce" (Pet. App. A-2), including a representative of the Napa County Board of Realtors. JA 218, 236.

The primary mandate imposed by the Ordinance is a requirement that developers of ten or more residential units make 10% of those units affordable to households of lower incomes. Municipal Code § 15.94.050(A), Pet. App. G-29. Thus, 90% of a developer's units are not affected by the Ordinance in any way. Moreover, the Ordinance includes a host of benefits that may substantially alleviate the purported cost of compliance:

- Applications for developments that include affordable housing receive expedited consideration before other residential land use applications. Municipal Code § 15.94.050(F)(1)(b), Pet. App. G-33 to G-34. Faster processing of development applications can save developers considerable money, since it reduces the time they have to carry financing on the land prior to development, and thus reduces their interest and other financing costs.[2]

- The City Council may provide density bonuses (or other incentives of equal financial value) that would not be available under state law. Under California law, a developer who agrees to construct 20% of its units for low-income households (or 10% for very-low-income households) is entitled to a "density bonus" of at least 25% more units than "the otherwise maximum allowable residential density under the applicable zoning ordinance. . . ." CAL. GOV'T CODE § 65915(a), (f). Under the Ordinance, however, density bonuses are available to projects where only 10% of the units have been designated for low-income tenants. Municipal Code § 15.94.050(F)(2)(a), Pet. App. G-34. Because density bonuses permit developers to sell additional houses with only minimal incremental costs for land

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2. Petitioner errs in asserting that the incentives contained in the Ordinance are available only to developers that "exceed" its requirements. Pet. 5. The Ordinance plainly makes all the "concessions or incentives" listed in subsection (F) applicable to all "residential development projects which *meet* the requirements" contained in subsection (A), which imposes the affordable housing mandate. Municipal Code § 15.94.050(F)(1), Pet. App. G-33 (emphasis added).

and improvements, the availability of density bonuses can substantially mitigate or eliminate any economic burden caused by affordable housing mandates.

- The City may waive or modify City standards in order to reduce total project costs upon a showing by the developer that the modification is necessary for the feasibility of the residential development project. Municipal Code § 15.94.050(F)(2)(b), Pet. App. G-34.

- The City may provide direct financial assistance in the form of a loan or a grant. Municipal Code § 15.94.050(F)(2)(c), Pet. App. G-34.

- The City may forgive all or a portion of the 10% requirement upon a showing that imposition of the requirement will cause "undue hardship" and that the project will contribute significantly to affordable housing within the City. Municipal Code § 15.94.050(G)(2), Pet. App. G-35.

- A developer may appeal to the City Council "for a reduction, adjustment or waiver" of the affordable housing requirement "based upon the absence of any reasonable relationship or nexus between the impact of the development and . . . the inclusionary requirement." Municipal Code § 15.94.080(A), Pet. App. G-40.

Moreover, the Ordinance provides two alternative means by which the developers of single-family housing may meet the 10% requirement as of right, either by submitting an

"alternative equivalent proposal," including a dedication of land or the construction of affordable units on another site, or by paying an "in-lieu fee," based upon the construction costs of market rate dwelling units. Municipal Code § 15.94.050(B),(C), Pet. App. G-30 to G-32. Developers of multifamily housing may propose to meet their inclusionary zoning requirements by either of these methods, subject to discretionary approval by the City Council. *Id.*

Because this lawsuit has been brought as a facial challenge, there is nothing in the record showing how the Ordinance has been applied to any particular development. Indeed, as noted above, the complaint contains *no* allegations at all regarding the economic impact of the Ordinance on Petitioner, its members or anyone else.

Instead, Petitioner contends that the mere enactment of the Ordinance has somehow violated the constitutional rights of it and its members. Petitioner thus contends that a court may hold the Ordinance unconstitutional under the Takings Clause in the abstract, without waiting for a concrete case involving its application to specific property. The California courts properly held that these claims did not state a cause of action, and Petitioner has shown no reason why this Court should review that decision.[3]

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3. The argument that follows addresses only Petitioner's claim under the Takings Clause. With respect to Petitioner's other contentions, the Respondents filing this brief (who intervened to defend the Ordinance in the trial court) adopt the arguments set forth in the City's Brief in Opposition.

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S TAKINGS CLAUSE CLAIM IS NOT RIPE FOR REVIEW BECAUSE PETITIONER HAS NOT ALLEGED THAT THE CHALLENGED ORDINANCE HAS OR WILL HAVE ANY ADVERSE ECONOMIC IMPACT ON IT OR ITS MEMBERS.

The state courts which adjudicated Petitioner's claims under the Takings Clause were of course not bound by the limits imposed on constitutional adjudication in the federal courts. Consequently, they did not need to follow this Court's "oft-repeated admonition that the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-95 (1981) ("*Hodel*"). However, this rule binds this Court, and applies when a petitioner seeks review of a state court decision under 28 U.S.C. § 1257(a).[4]

"Adherence to this rule is particularly important in cases raising allegations of an unconstitutional taking of private property." *Hodel*, 452 U.S. at 295; *accord Pennell v. City of San Jose*, 485 U.S. 1, 10 (1988). That is because "no precise rule determines when property has been taken." *Agins v. City of Tiburon*, 447 U.S. 255, 260-61 (1980). Instead, "the question necessarily requires a weighing of private and public interests." *Id.* at 261.

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4. An exception to this rule applies when a state court adjudicating a constitutional claim issues relief that gives the state court defendant standing to seek review in federal court. *See, e.g., Asarco, Inc. v. Kadish*, 490 U.S. 605, 617-19 (1989). But that obviously did not happen here.

The weight of the "private interest" depends in large part on the economic impact of the challenged legislation. The "test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property. . . ." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987) ("*Keystone*"); *see Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) ("[o]ne fact for consideration in determining [whether the Takings Clause has been violated] is the extent of the diminution"). Consequently, whether there has been a violation of the Takings Clause "depends upon the particular facts." 260 U.S. at 413. Thus, the Court has summarized its Taking Clause jurisprudence as follows:

> [T]his Court has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." Rather, it has examined the "taking" question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as *the economic impact of the regulation, its interference with reasonable investment backed expectations*, and the character of the government action—that have particular significance. (*Keystone*, 480 U.S. at 494 (quoting *Hodel*, 452 U.S. at 295-96) (citations omitted; emphasis added))

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), illustrates the importance of these factors in resolving claims under the Takings Clause. In that

case, the plaintiffs, who owned Grand Central Terminal in New York City, contended that the city had "taken" their property when it denied them permission to construct a fifty-three-story building on top of the Terminal. In rejecting plaintiffs' claim, the Court first emphasized that the city had not prohibited *all* construction over the Terminal, but only construction over fifty stories, and that it might approve a smaller building that "harmonized" better with the Terminal. *Id.* at 137. But the Court then went on to say that, even if the plaintiffs had been totally prohibited from building above the Terminal, the city had given them "transferable development rights" which might permit them to build elsewhere, and that the value of these rights had to be taken into account when adjudicating plaintiffs' takings claim:

> [T]o the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied *all* use of even those pre-existing air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings. Although appellants and others have argued that New York City's transferable development-rights program is far from ideal, the New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable. While these rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, *are to be taken*

> *into account in considering the impact of regulation*. (*Id.* at 137 (footnote omitted and second emphasis added))

In this case, however, the record contains nothing regarding two of the key factors identified in *Keystone* and *Hodel* as necessary for analysis of claims under the Takings Clause: "the economic impact of the regulation" and "its interference with reasonable investment backed expectations." Indeed, as noted above, Petitioner's complaint does not contain a single allegation regarding the economic impact of the Ordinance it seeks to challenge, much less information regarding the degree to which the Ordinance interferes with "reasonable investment backed expectations." Instead, Petitioner's challenge is wholly abstract, brought before there had even been a single application of the ordinance it asserts to have violated its constitutional rights.

Pennell v. City of San Jose, 485 U.S. 1 (1988), compels rejection of this challenge. There the plaintiffs contended that a provision in a rent control ordinance permitting a hearing officer to lower an otherwise reasonable rent based on "economic and financial hardship" to the property's tenants violated the Takings Clause. *See id.* at 4, 9. Like the Ordinance, the "tenant hardship" provision in *Pennell* had not been applied before the lawsuit was filed; moreover, that provision did not impose a mandatory duty on the part of the hearing officer to lower rents, but only required the officer to "consider" the hardship that a prospective rent increase might impose on the tenant. The Court found the action premature:

> [T]he mere fact that a hearing officer is enjoined to consider hardship to a tenant in fixing a

> landlord's rent, *without any showing in a particular case as to the consequences of that injunction in the ultimate determination of the rent*, does not present a sufficiently concrete factual setting for the adjudication of the takings claim appellants raise here. (*Id.* at 10 (emphasis added)).

Petitioner's claim is no more concrete than the claim rejected in *Pennell*. The provisions of the rent control ordinance challenged in that case gave the hearing officer discretion to determine in individual situations how the "tenant hardship" provision would be applied. *See* 485 U.S. at 10. Similarly, the provisions of the Ordinance give the City administrative discretion to avoid even a potential claim that the Ordinance is being applied unconstitutionally, as well as a variety of tools to modify application of the Ordinance in appropriate cases without having to exempt a piece of property totally. Thus, if the City believes that application of the Ordinance to a particular residential development might raise constitutional questions, or is simply unreasonable under the circumstances, it can take a number of steps to reduce the Ordinance's economic impact: provide additional density bonuses, waive or modify municipal requirements to reduce project costs, forgive all or a portion of the 10% requirement or even provide "direct financial assistance in the form of a loan or grant." *See* pp. 6-7, *supra*. The existence of such discretion under the Ordinance precludes Petitioner from challenging it under the Takings Clause before it has been applied to *any* specific property.[5]

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5. Petitioner improperly frames the ripeness issue as solely dependent on the waiver provision. Pet. 21-25. Not so. The Ordinance (Cont'd)

The nature of Petitioner's Takings Clause claim also precludes a facial challenge. Petitioner contends that *Dolan v. City of Tigard*, 512 U.S. 374 (1994), requires "some 'rough proportionality' between an exaction and the adverse impact caused by the use of the underlying property. . . ." Pet. 10. But the "rough proportionality" purportedly required by *Dolan* cannot be measured outside the context of a specific

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(Cont'd)
does not require the City either to apply the Ordinance with full force to a particular development or to give the property a blanket exemption from the Ordinance's requirements. Instead, as discussed above, the Ordinance gives the City a wide array of choices in determining how to apply the Ordinance to any particular developer. *See* pp. 6-7, *supra*.

The cases cited by Petitioner that have adjudicated facial challenges under the Takings Clause (Pet. 24) all involved situations where the record contained evidence of the economic impact of the challenged regulation. In *Keystone*, for example, there was a stipulation that the challenged regulation would "require petitioners to leave approximately 27 million tons of coal in place." 480 U.S. at 498. In *Hodel*, the Court rejected the plaintiffs' facial challenge under the Takings Clause because the record indicated that enactment of the challenged statute did not deprive plaintiffs "of economically viable use of their property." 452 U.S. at 297. The "bill" in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), similarly contained detailed allegations concerning the alleged effect of the challenged zoning ordinance on the plaintiff's property. *See id.* at 384 (zoning alleged to decrease market value of property from $10,000 to $2,500 per acre). And in *Beacon Hill Farm Associates II Ltd. Partnership v. Loudoun County Board of Supervisors*, 875 F.2d 1081 (4th Cir. 1989), the plaintiff alleged that enactment of the challenged ordinance had caused it damages in excess of $22 million. *Id.* at 1082. No such allegations are found in Petitioner's complaint.

application. In a facial challenge, there is simply no "proportionality" to measure.[6]

Indeed, the ameliorative provisions of the Ordinance provide a complete answer to Petitioner's *Dolan* claim. The Ordinance permits a developer to seek a modification

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6. As Judge Brunetti of the Ninth Circuit has explained:

> The *Dolan* analysis cannot be applied in facial takings cases. "A facial challenge involves a claim that the mere enactment of a statute constitutes a taking, while an as-applied challenge involves a claim that the particular impact of a government action on a specific piece of property requires the payment of just compensation." In *Dolan*, the Court analyzed whether the government's exaction was too costly. However, in a facial claim, the court does not analyze the exaction at all. (*Garneau v. City of Seattle*, 147 F.3d 802, 811 (9th Cir. 1998) (citation omitted))

While the concurring Judge in *Garneau* did not sign the quoted opinion, he agreed "that the facts of the case at bar are not amenable to an analysis under the just compensation clause, much less the 'individualized determination' required by *Dolan*." *See* 147 F.3d at 820 (Williams, J., concurring) (footnote omitted).

In *Yee v. City of Escondido*, 503 U.S. 519 (1992), the Court held that petitioners could bring a facial challenge under the Takings Clause to a mobile home rent control ordinance without seeking a rent increase if their theory of liability did "not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property. . . ." *Id.* at 534. But there was no claim in that case that the "rough proportionality" required by *Dolan* had not been established; indeed, *Yee* was decided two years before *Dolan*. It therefore does not provide authority for a facial challenge in this case.

of its requirements "based upon the absence of any reasonable relationship or nexus between the impact of the development and either the amount of the fee charged or the inclusionary requirement." Municipal Code § 15.94.080(A), Pet. App. G-40. Thus, should the City apply the Ordinance only in circumstances where a nexus exists between the burdens it imposes on the *individual* development and that development's individualized impact on affordable housing, Petitioner's complaint that the Ordinance was adopted without a *generalized* finding of such a nexus will be moot. Petitioner's claim of "lack of proportionality" is thus (at best) woefully premature.

II.

THE "ROUGH PROPORTIONALITY" REQUIRED BY *DOLAN* WHEN A CITY EXACTS PROPERTY BY MEANS OF AN INDIVIDUALIZED ADJUDICATORY AND DISCRETIONARY EXERCISE OF THE POLICE POWER DOES NOT APPLY TO AN ORDINANCE THAT DOES NOT EXACT PROPERTY AND WHICH WAS IMPOSED LEGISLATIVELY ON THE CLASS OF ALL RESIDENTIAL DEVELOPERS.

"A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Petitioner cannot make such a showing; indeed, its complaint does not even allege that the Ordinance cannot be constitutionally applied.

The only Takings Clause claim discussed in the petition is the assertion that the City has failed to show that a "rough

proportionality" exists between the availability of affordable housing within the City and the construction of market-rate housing. But this Court has "not extended the rough-proportionality test of *Dolan* beyond the special context of exactions — land use decisions conditioning approval of development on the dedication of property to public use." *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 702 (1999). That is so for good reason. Before "heightened scrutiny" applies, the government must take *property*. Indeed, the requirements imposed by *Dolan* and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), exist to prevent the government from achieving indirectly through a permit condition what it could not achieve directly without paying just compensation. *See, e.g.*, *Nollan*, 483 U.S. at 834 ("Given . . . that requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment, the question becomes whether requiring it to be conveyed as a condition for issuing a land-use permit alters the outcome"); *Dolan*, 512 U.S. at 384 ("Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred"). This logic does not apply where there has been no exaction.[7]

This case proves the point. The Ordinance does not require the dedication of property. *A fortiori*, no dedication has been imposed to achieve an unconstitutional purpose. Accordingly, Petitioner cannot claim that the City is using the permit power to achieve indirectly what it could not

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7. This brief does not discuss Petitioner's claim that a conflict exists with respect to the applicability of *Nollan* and *Dolan* to this case. Instead, we adopt the City's submission on this issue.

constitutionally do directly without the payment of just compensation.

At most, the Ordinance might cause developers of property in the City to receive somewhat less revenue for developing 10% of their units than they might otherwise have received had the Ordinance not been enacted — though even that is unclear and Petitioner has made no such allegation. Indeed, there is every reason to believe that whatever financial detriment is caused by the City's affordable housing mandate is more than compensated for by increased density bonuses and the other benefits available under the Ordinance. But even if it exists, this hypothetical decrease in future lost revenue is not a discrete piece of property that the City has exacted. Instead, it is no different for constitutional purposes than the economic impact caused by any other form of land use legislation, such as minimum acre restrictions, set-back requirements, or other restrictions on use. Where, as in this case, the City has not required the physical conveyance of property, *Nollan* and *Dolan* are not applicable.

Moreover, *Dolan*'s "rough proportionality" requirement applies only where a city makes a discretionary, individualized, adjudicatory decision to impose unconstitutional conditions upon a single landowner. It does not apply when a city makes a *legislative* decision to enact an ordinance on a broad class of property owners. Indeed, neither of this Court's cases that apply "heightened scrutiny" invalidated an ordinance on its face. *Nollan* did not invalidate the California Coastal Act's statutory public access requirements (*see* CAL. PUB. RES. CODE § 30212), but only the use of that act to require the Nollans to grant an easement across their property as a condition of securing a permit to rebuild their house. *See Nollan*, 483 U.S. at 841-42. Nor did

Dolan hold the relevant state and municipal land use statutes and ordinances (*see* 512 U.S. at 377-79) facially unconstitutional because they did not require "rough proportionality." Instead, the Court held that the city could not rely on those laws to require a particular landowner to dedicate a floodplain easement as a condition of building a larger store on her property because the city had failed to make "some sort of *individualized* determination that the required dedication is related both in nature and extent to the impact *of the proposed development*." *Id.* at 391 (footnote omitted and emphases added). Similarly, when the city in *Dolan* attempted to require a landowner to dedicate property for a pedestrian/bicycle pathway, the Court held that it had to "quantify its findings in support of the dedication" (*id.* at 395-96), not that it had to amend its zoning ordinances to require some sort of general proportionality.

But even if this case somehow involved the taking of property (which it does not), and even if *Nollan* and *Dolan* could be invoked in a facial challenge to the mere enactment of legislation (which they cannot), "heightened scrutiny" under *Nollan* and *Dolan* does not apply to a law of general application. Unlike the administrative exactions in *Nollan* and *Dolan*, the Ordinance does not impose unique burdens on individual property owners. Instead, it imposes affordable housing requirements on the development of *all* residential and nonresidential property within the City.[8] The discretion it gives the City Council to mitigate the inclusionary zoning mandate is triggered by the developer, not the City; and in

8. Because Petitioner's membership allegedly consists *only* of "builders, contractors, and related trades and professions involved in the residential construction industry" (JA 2), it has no standing in this Court to challenge the constitutionality of the Ordinance as applied to developers of non-residential property.

any event can be exercised only in the developer's favor. Thus, the City has no power to *increase* the burden imposed by its Ordinance in a particular case above the minimum provided in the Ordinance; it can only *decrease* the burden.

Dolan and *Nollan* recognized that a city's exercise of discretionary, adjudicatory power over an individual landowner requires special constitutional safeguards. When a city makes a decision that affects only a single property owner, the property owner is uniquely vulnerable to an extortionate use of the police power. In that situation, the local public entity can abuse its permitting authority to exact property, and the affected property owner has no remedy other than to surrender its property, do without the permit or sue.

When a city enacts legislation that affects a broad class of property owners, however, the balance of power is quite different. The fact that a land use regulation applies to "a large number of parcels" "provides assurances against arbitrariness" (*Penn Central*, 438 U.S. at 135 n.32) that do not exist when government exacts property from an individual property owner.[9] That is because property owners

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9. As Justice Jackson stated in *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949):

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick

(Cont'd)

as a class have ample political power to protect themselves against arbitrary legislative action that individual landowners do not. Moreover, prospective residents in California pay a disproportionate share of property taxes under Proposition 13 because their assessments are based on acquisition value. *See Nordlinger v. Hahn*, 505 U.S. 1 (1992). Accordingly, cities in California have an interest in promoting development that has no counterpart when a city decides to impose burdens on a single landowner. Indeed, the Ordinance is the result of a legislative exercise in community consensus-building that considered — and, indeed, reflected — the views of *all* segments of the City, including developers. *See* p. 5, *supra*.

For all these reasons, heightened scrutiny is justified only when the government seeks to take *property* through the exercise of a permit condition on an *individual landowner* that it would have to pay for if it took the property directly. That is not true here, where the Ordinance applies to all developers as a class and takes no property from any developer, either directly or indirectly. Thus, even if Petitioner's Takings Clause claim were properly before the Court, the California Court of Appeal's refusal to apply "heightened scrutiny" to this case raises no issue worthy of review.

(Cont'd)

> and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation. (*Id.* at 112-13) (Jackson, J., concurring).

CONCLUSION

For these reasons, and for the reasons set forth in the City of Napa's Brief in Opposition, the petition should be denied.

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No. 01-893

In the
Supreme Court of the United States

HOME BUILDERS ASSOCIATION
OF NORTHERN CALIFORNIA,
Petitioner,
v.
CITY OF NAPA,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the State of California

PETITIONER'S REPLY TO THE OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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1

INTRODUCTION

At bottom, this case raises the question of whether and how courts should scrutinize attempts by a local government to impose the off-budget costs of worthy social programs on landowners who must obtain permits from that government. Petitioner submits that attempts to make landowners the deep pockets for socially desirable housing programs may be expedient, but unless a City can justify such cost-shifting in the face of ***meaningful*** judicial review, there has been a "a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

I

THE ORDINANCE FAILS TO SUBSTANTIALLY ADVANCE A LEGITIMATE GOVERNMENTAL INTEREST

A. Admirable Social Goals Alone Do Not Justify Exactions

Respondent suggests that the lower court correctly concluded "that creating affordable housing opportunities is a legitimate state interest." Respondent's Brief in Opposition (Opp.) at 2. Of course it is. So may be creating skateboard parks, hiring street sweepers, or sending local politicians on "fact-finding" missions to foreign cities. But that does not mean that persons wishing to develop new housing should bear the brunt of subsidizing such parks, street sweepers, or political junkets–unless the City can make some kind of credible case that new home builders create a particular need for such things over and above the general public. Low-income housing is no different. Unless the City can show that persons building new homes and apartments are responsible for a shortage of low-income housing, they should not have to pay more than their fair share to ameliorate the problem. The difficulty here is that programs that pass the costs of desirable programs to a small minority of taxpayers are politically popular. As a result, some,

but not all, state and lower federal courts have been loathe to apply the standards of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), to development exactions when they are imposed legislatively or involve alternatives to outright land dedication. This Court should grant review to explain the true reach of the Takings Clause.

B. The City Has Not Justified Shifting the Cost of Low-Income Housing to the Builders of New Housing

To put it simply, landowners in the City of Napa are being conscripted to buy and build the City out of a perceived shortage of low-income housing that is the City's own fault. Respondent insists, however, that the City has fully justified the ordinance by referring to the 700-page administrative record of analyses, studies, and other materials. Respondent claims, for example, that the ordinance was, "adopted after years of study, consideration, and input." Opp. at 6. But ***none*** of this study or input addressed the question of whether developers of new homes in any way contributed to a shortage of affordable housing. Respondent does not and cannot cite to a single sentence anywhere in that record that even purports to demonstrate, or even discuss, ***any*** kind of relationship between the construction of new housing at market rates and an exacerbated need for subsidized low-income housing. The reason is simple. Outside of a few precatory sentences in the ordinance itself, there is none.[1] The city merely dumped into the record 700 pages of hearings and studies about low-income

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[1] Intervenor-Respondents' record citations are quite unhelpful. *See* Brief in Opposition for Respondents Napa Valley Community Housing, et al. (Int. Opp.) at 4. The record cites are to (1) the Ordinance itself (JA at 356), (2) a General Plan excerpt showing only that home builders concentrate on single family homes (JA at 550), (3) a study on the impact of *commercial* development on housing (JA at 686), and (4) the Intervenors' trial complaint! (JA at 794.)

housing needs in the City and elsewhere; but ***none*** of those studies or analyses ***anywhere*** claim that new home construction is the cause of any such shortage.[2]

Respondent continues that "in direct contradiction to Petitioner's statement that no evidence demonstrated that new residential housing contributes to the City's need for low-income housing . . . the City Council made numerous findings." Opp. at 7. But Respondent has not and cannot point to a single line in the record that provides any support for any of the City Council's "findings." As for these findings, Petitioner actually agrees with one of the underlying premises: that the City's Urban Limit line contributes to the shortage of affordable housing. *See* Opp. at 7; Appendix to Petition for Writ of Certiorari (App.) at G-7, ¶ 2(F). But, the City Council's assertion that the construction of new homes and apartments, in contravention of the basic economic theory of supply and demand, exacerbates housing prices is rather speculative, to put it mildly. If the City desires to impose the burden of subsidizing low-income housing on the builders, buyers, and renters of new market rate housing, then it should be held to a higher burden than one met by the sort of data-free conjecture engaged in by Respondent and the laissez-faire review by

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[2] Incredibly, Respondent suggests that Petitioner "not once in this litigation" has ever mentioned or challenged the existence of, or factual support for, the City Council's legislative findings. This misstates the record. *See, e.g.*, Plaintiff's and Petitioner's Points and Authorities in Opposition to Demurrer at 2-11 (discusses the findings and the lack of record of support for those findings); Appellant's Opening Brief (filed in the court of appeal) at 6-15 (same). Furthermore, Petitioner has noted repeatedly that in every development permit granted by the City prior to passage of the ordinance, it expressly found that there would be no adverse impact on affordable housing. *See, e.g.*, court of appeal Joint Appendix (JA) at 8, Complaint ¶ 22.

the court below. Only this Court can reestablish the proper standards.

C. The Ordinance Imposes an Unlawful Exaction

Respondent also suggests that the requirement that builders either pay a fee or sell or rent housing at below-market rates is not really an exaction, but resembles more ordinary zoning setback requirements, for example, "[b]ecause . . . [it] limits the use of a small percentage (here ten percent) of property." Opp. at 6 n.7. *See also* Int. Opp. at 18. There are two main flaws with this argument. First, there is an obvious justification for setback zoning in that the development of real property creates a need for setbacks which are often an integral part of the construction project. Reasonable setbacks, for example, promote the circulation of air, prevent the spread of fires, and prevent excessive shading of neighboring properties. *Gcrieb v. Fox*, 274 U.S. 603, 609 (1927). A second and more fundamental objection to the characterization of the ordinance here as mere zoning is that the ordinance destroys the fundamental right to freely alienate a portion of the property by telling landowners to ***whom*** to sell or rent their property and ***how much*** to charge in sales price or rental–without regard to whether this may result in a loss to the landowner. This sort of interference with an owner's use of property is substantially more intrusive than an ordinary setback. And as such, it requires a more exacting review by the courts than a highly deferential rational basis standard.

Another reason why this Court should grant the petition is to instruct the state and lower federal courts that heightened scrutiny cannot be evaded by redefining "exactions." Respondent claims that the ordinance "does not require either a dedication or an exaction. Rather, it is a land use regulation which simply restricts the use of a very small percentage of a landowner's development." Opp. at 1. Clearly, the requirement here is an exaction. Landowners must dedicate a portion of

their development efforts and property to a low-income housing subsidy, or pay cash and substitute one form of exaction for another. A builder who satisfies the ordinance by actual construction will be dedicating land at a below-market price when he sells the unit. Exactions are defined in the literature as "[t]he process by which developers are required, as a condition of development approval, to dedicate sites for public or common facilities; construct and dedicate public or common facilities . . . make payments to defray the cost . . . of facilities . . . or otherwise provide . . . public amenities." Margaret Sohagi, *Exactions and Impact Fees in California* 15 (Solano Press 2001).[3] Respondent cannot avoid the impact of *Dolan* by claiming landowners may pay an in-lieu fee instead of building low-income housing. Many of the cases relied upon by the *Dolan* majority in formulating its "roughly proportional" nexus test involved fees: "All but one of the cases involve challenges to provisions . . . requiring developers to dedicate either a percentage of the entire parcel . . . or an equivalent value in cash." 512 U.S. at 400 (Stevens, J., dissenting).[4]

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[3] Furthermore, the City obviously believes that the in-kind requirement (constructing the unit), land dedication, and the in lieu fee are effectively the same–otherwise the ordinance would not allow compliance through these other methods. Indeed, the City staff itself described the program in terms of many other exactions, comparing it to the provision of "roads, water, parks, and schools." Napa City Council, Agenda Summary Report, March 3, 1999, *reproduced in* City's request for judicial notice, Exhibit 5, JA at 322.

[4] Nor can the impact of this Ordinance on landowners be avoided by any so-called "incentives." Opp. at 8 n.8, Int. Opp. at 6-7, 13. Respondent asserts first that "developers meeting the inclusionary requirement will receive, as a matter of right, preliminary development review, expedited processing, fee deferrals, and marketing assistance." *Id.* But because all developers are required to meet the requirements, expedited reviews and processing are

(continued...)

D. Heightened Judicial Review Is Appropriate

The reason, of course, that Respondent wishes to recharacterize this Ordinance as a simple zoning measure not involving an exaction is that Respondent believes that a zoning measure will be insulated from meaningful judicial review.

However, as this Court recognized in *Nollan*, such deference is unwarranted when government uses its power to impose conditions that are unrelated to any provable impact caused by the development. And, of course, this Court held that the government has the burden of proving that such an impact is roughly proportional to the exaction in *Dolan*, 512 U.S. at 391 & n.8.[5] The holdings in *Nollan* and *Dolan* follow naturally from the standard in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), that a regulation must substantially advance a

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[4] (...continued)
not much of an advantage. Fee deferrals refer only to a delay in having to pay the fees. *See* App. at G-34, Municipal Code § 15.94.050(F)(1)(c). As for "marketing assistance," all that means is that the City will buy any unsold subsidized units when a certificate of occupancy is issued. App. G-34, § 15.94.050(F)(2). Home builders, however, are not in the least bit worried that they will be unable to sell or rent units for substantially less than their market value. Finally, Respondent suggests "[o]ther discretionary incentives" are available. Opp. at 8-9 n.8. *See also* Int. Opp. at 6-7. However, as Petitioner noted previously, Pet. at 6, the "incentives" of Municipal Code § 15.94.050(F)(2) are available only to home builders who ***exceed*** the requirements of the ordinance, specifically those home builders who meet the requirements of a separate ordinance, Chapter 17.84. *Compare* App. at G-34, Municipal Code § 15.94.050(F)(2), and G-29, Municipal Code § 15.94.050(A), *with* Ch. 17.84 *reproduced at* App. I. With or without any incentives, however, there is no doubt that landowners must give up ***something*** of value in exchange for a development permit.

[5] As noted, *see* Pet. at 12, the exactions in both *Nollan* and *Dolan* were broadly applicable and followed from legislative enactments.

legitimate governmental interest.[6] It is simply not legitimate to condition the use of real property on paying a ransom that is unrelated to the proposed use.

It is the lack of an adequate nexus between the exaction and the use of property that counts, not the precise nature of the exaction. Thus, when the court of appeal below found that the nexus standard of *Nollan* and the rough proportionality test of *Dolan* apply only to nonlegislatively imposed exactions of real property, it was wrongly focusing its attention entirely on the nature of the exaction, rather than on the impediment that is being imposed on the exercise of the constitutional right. In other words, what is unconstitutional is that a landowner is forced to undertake an involuntary action that is not related in any real degree to any impact caused by the proposed use of the land. The particular type of involuntary action and the manner of imposition is far less important to the analysis than is the lack of nexus and proportionality.[7]

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[6] Because the Takings Clause claim is based on allegations that the Ordinance fails to substantially advance a legitimate governmental interest, Respondent's and Intervenor-Respondents' discussion of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), is irrelevant. Opp. at 21, Int. Opp. at 10-12. Petitioner is not alleging a denial of economically viable use; thus there is no need to "balance" and no need to determine the scope of economic injury from an application of the Ordinance. Even if *Penn Central* applied, it does not undercut Petitioner's argument. Building an office tower on top of a landmark would have had an obvious impact on an existing landmark. Here, in contrast, the Ordinance is not concerned with developers who may seek to ***replace*** existing low-income housing, but all developers of market rate housing.

[7] Intervenor-Respondents claim Petitioner never alleged that the Ordinance can "never" be constitutionally applied. Int. Opp. at 1, 16. This is ridiculous. The complaint at Paragraphs 23-27, JA at 8-9, speaks for itself.

A recurring theme by which Respondent tries to avoid the nexus logic of *Nollan* and the rough proportionality test of *Dolan*, and by which it seeks to distinguish those conflicting cases that have applied heightened scrutiny either in the context of a legislatively enacted exaction or an inclusionary zoning requirement, is to suggest that this Court changed everything in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). *See, e.g.*, Opp. at 2, 13, 15-17. *City of Monterey*, of course, questioned the extension of *Dolan*'s rough proportionality test to permit ***denials***; it did not purport to address any limits on the applicability of *Nollan*'s nexus language. *See, e.g.*, 526 U.S. at 702-04. *City of Monterey* was filed and argued in the lower courts before *Dolan* was decided by the Supreme Court. One of the key arguments raised by the landowners in *City of Monterey* was that the City's denial of the landowners' permit applications failed to substantially advance a legitimate governmental interest. *See Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1430 (9th Cir. 1996). When this issue was presented to a jury, the jury found that the landowner was correct and that the city had no reasonable justification for its permit denials. *Id.* at 1429; *City of Monterey*, 526 U.S. at 701. On appeal, the Ninth Circuit recognized that the newly articulated "rough proportionality" standard in *Dolan* was related to the "substantially advance" standard of *Agins*. It then extrapolated the rough proportionality standard to a challenge based on an allegation that the permit denial failed to substantially advance a legitimate governmental interest. *Del Monte Dunes*, 95 F.3d at 1430.

But, as this Court held, this was inappropriate. *City of Monterey*, 526 U.S. at 702-03. First of all, "rough proportionality" is an unhelpful standard when addressing a permit denial. In *Dolan* the standard made sense: the City there could calculate the traffic impact created by Mrs. Dolan's enlarged store and it could assess the proportionate amount by which a bicycle trail could reduce that impact. But such an

approach is not helpful in assessing whether a permit denial fails to substantially advance a legitimate governmental interest–after all, it is difficult to determine whether a permit denial is roughly proportional to anything. As this Court said, the proportionality standard "was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on ***excessive exactions*** but on denial of development." *City of Monterey*, 526 U.S. at 703 (emphasis added).

However, nothing in this Court's *City of Monterey* decision limited the application of *Dolan*'s rough proportionality test only to dedications of land. In saying that "this Court has [not] provided . . . a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions," 526 U.S. at 704, it was referring to ***both*** exactions and dedications. Indeed, a land dedication is merely a subset of the universe of exactions. *See, e.g.*, Sohagi, *supra*, at 15.

In short, the *City of Monterey* decision did nothing to erase the conflict in the state and lower federal courts over the appropriate standard of review. The conflict remains in the state and lower federal courts over when to apply a more searching standard of review to exactions imposed as a condition for a development permit.

Finally, because any application of the Ordinance will require landowners to give up something in exchange for a permit, landowners suffer an immediate and adverse impact on their rights in property. Because this impediment on the interests of landowners was effected by the passage of this law, the Takings Clause claim based on a failure to show either nexus or rough proportionality is ripe for review.

II

THE ORDINANCE WILL DEPRIVE LANDOWNERS OF DUE PROCESS

One of the major objections to the Ordinance is that it will require owners of rental housing to rent their homes and apartments at subsidized below-market rates in perpetuity. Pet. at 26-30. Respondent seeks to recharacterize this problem, insisting that Petitioner is demanding application of a " 'fair return' " analysis to land use regulations governing new development." Opp. at 23. Not so. Petitioner is not seeking here a guarantee of any kind of return on new development. Rather, Petitioner is concerned that after 10% of the units are set aside for low and very low-income housing, the present and subsequent owners of those units will never have any opportunity to adjust rents in order to ensure a fair return, capture capital improvements, or otherwise increase rents to account for changed and unforseen circumstances between now and the end of time. In this regard, the "in perpetuity" requirement to hold rentals at rates tied only to a percentage of the median income of Napa residents is unlike every other rent control ordinance in the nation.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: February, 2002.

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